

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 142

ENDICOTT JOHNSON CORPORATION, AND HOW-
ARD A. SWARTWOOD, SECRETARY, ENDICOTT
JOHNSON CORPORATION, PETITIONERS,

vs.

FRANCES PERKINS, SECRETARY OF LABOR OF
THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 11, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

INDEX

	Page
Statement under Rule 13.....	1
Summons [omitted in printing].....	2
Complaint and Application.....	3
Exhibit "A" annexed to Complaint and Application (Sub- poena).....	8
Exhibit "B" annexed to Complaint and Application (Sub- poena).....	10
Answer.....	11
Exhibit "A" annexed to Answer (administrative answer).....	24
Stipulation as to Denials in Answer.....	35
Plaintiff's Motions for Judgment on the Pleadings, etc.....	36
Affidavit of Gerard D. Reilly in Support.....	37
Exhibit A annexed to Affidavit of Gerard D. Reilly.....	40
Exhibit B annexed to Affidavit of Gerard D. Reilly.....	41
Affidavit of Howard A. Swartwood in Opposition.....	42
Opinion of February 1, 1941.....	55
Order of February 10, 1941.....	59
Motion to Vacate Order of February 10, 1941.....	61
Order of February 19, 1941, resettling order of Feb. 10, 1941.....	63
Plaintiff's Motion to Amend Complaint and Application.....	65
Defendants' Motion to Amend Answer.....	66
Order Allowing Amendments.....	67
Renewed Motions for Judgment on the Pleadings, etc.....	68
Memorandum as to Stipulation.....	69
Order Setting Aside Stipulation.....	69
Stipulation as to Authenticity of Copies.....	69
Transcript of Proceedings at Hearing.....	71
Evidence on behalf of plaintiff:	
William B. Grogan.....	72
Clifford P. Grant.....	101
George H. Roller.....	104
Mrs. Mary P. Hogue.....	108
William E. Stevenson.....	124
William B. Grogan (re-called).....	166

Transcript of Proceedings—Continued.

Evidence on behalf of defendants:

	Page
Ralph B. Clark.....	137
Herbert U. Schenck.....	155
George Dennis.....	156
Paul R. Knickerbocker.....	157
Plaintiff's Exhibit 1-B (excerpts from contract).....	171
Plaintiff's Exhibit 2-B (notice of award of contract).....	177
Plaintiff's Exhibit 3-A (excerpts from Rulings and Interpretations, 1937).....	178
Plaintiff's Exhibit 3-B (excerpts from Rulings and Interpretations, 1939).....	183
Plaintiff's Exhibit 4-A for Identification (correspondence relating to ruling on the Public Contracts Act).....	185
Plaintiff's Exhibit 4-B for Identification (correspondence relating to ruling on the Public Contracts Act).....	189
Plaintiff's Exhibit 4-C for Identification (correspondence relating to ruling on the Public Contracts Act).....	194
Plaintiff's Exhibit 4-D for Identification (correspondence relating to ruling on the Public Contracts Act).....	198
Plaintiff's Exhibit 4-E for Identification (correspondence relating to ruling on the Public Contracts Act).....	202
Plaintiff's Exhibit 6 (letter of Feb. 23, 1936, from Mr. Walling to Mr. Charles Johnson).....	204
Plaintiff's Exhibit 7 for Identification (inter-office memo. of Mar. 17, 1939, from Mr. Grogan to Mr. Walling).....	205
Plaintiff's Exhibit 8 for Identification (summary of Government contracts for boots and shoes).....	207
Plaintiff's Exhibit 9 (letter of July 15, 1939, from Mr. Walling to Mr. Johnson).....	207
Plaintiff's Exhibit 10 for Identification (letter of December 5, 1939, from Mrs. Hogue to Mr. Fogg).....	208
Plaintiff's Exhibit 11 (amended administrative complaint).....	209
Plaintiff's Exhibit 12 (Endicott Johnson Corporation's summary of leather produced during periods of Government contracts).....	222
Plaintiff's Exhibit 13 (administrative hearing of Dec. 13, 1939).....	228
Plaintiff's Exhibit 14 for Identification (excerpts from report by Mrs. Hogue).....	261
Plaintiff's Exhibit 15 for Identification (letter of Feb. 16, 1939, from Mr. Stevenson and Mrs. Hogue to Mr. Fogg).....	262

INDEX

III

Page

Plaintiff's Exhibit 16 for Identification (letter of Mar. 9, 1939, from Mr. Stevenson and Mrs. Hogue to Mr. Fogg)	264
Defendant's Exhibit A for Identification (Circular Letter No. 200 from Procurement Division, Treasury Department)	265
Defendant's Exhibit B (excerpt from Secretary's determination of Dec. 21, 1937, of wages in the men's welt shoe industry)	267
Defendant's Exhibit C (excerpt from wage order for shoe industry, under Fair Labor Standards Act)	268
Defendant's Exhibit D (excerpt from 1935 census report on leather)	269
Defendant's Exhibit E (excerpt from 1937 census report on leather)	271
Defendant's Exhibit F (excerpt from preliminary 1939 census report on leather)	273
Defendant's Exhibit G (excerpts from N. R. A. Code for Boot and Shoe Manufacturing Industry)	273
Defendant's Exhibit H (excerpts from N. R. A. Code for Leather Industry)	274
Defendant's Exhibit I (excerpts from amendment to N. R. A. Code for Leather Industry)	275
Defendant's Exhibit J (excerpts from N. R. A. Code for Rubber Manufacturing Industry)	276
Opinion of August 19, 1941	278
Final Order and Judgment	283
Notice of Appeal	284
Petition for Appeal	284
Assignment of Errors	285
Order Allowing Appeal	291
Citation and Returns on Service of Writ	292
Stipulation re Bill of Exceptions, etc.	293
Order re Bill of Exceptions, etc.	293
Stipulation as to Exhibits to be Transmitted Physically	294
Order as to Transmission of Physical Exhibits	295
Orders Extending Time to Docket the Appeal	296
Stipulation as to Record	296
Clerk's Certificate	297
Proceedings in U. S. C. C. A., Second Circuit	298
Opinion, Frank, J.	298
Judgment	333
Clerk's certificate (omitted in printing)	333
Order allowing certiorari	334



1 United States Circuit Court of Appeals for the
Second Circuit

FRANCES PERKINS, SECRETARY OF LABOR OF THE UNITED STATES,
PLAINTIFF-APPELLANT

v.

ENDICOTT JOHNSON CORPORATION, A CORPORATION, AND HOWARD A.
SWARTWOOD, SECRETARY, ENDICOTT JOHNSON CORPORATION, DE-
FENDANTS-APPELLEES

Statement Under Rule 13

1. The proceeding was commenced in the District Court of the United States for the Northern District of New York, on January 15, 1940.

2. The names of the parties are as hereinabove given. There has been no change of parties in the proceeding since its commencement.

3. The complaint and application was filed on January 15, 1940. The joint answer of the defendants was filed on February 21, 1940. The complaint and application was amended on motion on March 19, 1941. The answer was also amended on motion on March 19, 1941.

4. The defendants were not arrested, nor was any bail taken. No property was attached or arrested.

2 5. The plaintiff's motions for judgment on the pleadings, for summary judgment, or, in the alternative, for an order enforcing the subpoenas, were argued before Honorable Frederick H. Bryant, District Judge, on June 26, 1940.

6. The resettled order denying plaintiff's original motions for judgment on the pleadings and for summary judgment, and reserving decision on the motion for enforcement of the subpoenas until after the hearing, was entered February 19, 1941.

7. A hearing, at which evidence was taken, was held on April 24 and 25, 1941, by Honorable Frederick H. Bryant, District Judge. The plaintiff's renewed motions for judgment on the amended pleadings and for summary judgment were heard at the same time.

8. No question was referred to a commissioner, master, or referee.

9. The final judgment and order dismissing and denying plaintiff's complaint and application, and denying plaintiff's renewed motions for judgment on the pleadings and for summary judgment was entered on October 27, 1941.

10. The appeal was taken by plaintiff by filing notice of appeal on November 5, 1941, and by the order allowing an appeal signed on November 5, 1941, and entered on November 14, 1941.

3 *Memorandum*

Summons in usual form omitted in printing.

4 *Complaint and application*

(Filed January 15, 1940)

District Court of the United States for the Northern District of
New York

Civil Action

File Number 353

FRANCES PERKINS, SECRETARY OF LABOR OF THE UNITED STATES,
PLAINTIFF

v.

ENDICOTT JOHNSON CORPORATION, A CORPORATION, AND HOWARD A.
SWARTWOOD, SECRETARY, ENDICOTT JOHNSON CORPORATION,
DEFENDANTS

COMPLAINT AND APPLICATION

1. This action and application arises under the Act of June 30, 1936, entitled "An act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," 49 Stat. 2036; U. S. C., Title 41, secs. 35-45, as hereinafter more fully appears.

2. The defendant Endicott Johnson Corporation is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at Endicott, in the State of New York, and having establishments in Binghamton, Johnson City, and Endicott, all within the State of New York, and is and has been engaged in manufacturing and furnishing the materials, articles, supplies and equipment referred to in paragraph 4 hereof.

3. The defendant Howard A. Swartwood is, and at all times hereinafter mentioned was, Secretary of defendant Endicott Johnson Corporation.

4. Pursuant to certain invitations to bid, defendant Endicott Johnson Corporation was awarded, by the Government of
5 the United States, and with it made and entered into the

following contracts, upon the dates and for the materials stated:

Number of contract	Date	Materials
W-155-QM-ECW-49	October 28, 1936	Shoes.
W-155-QM-ECW-50	November 10, 1936	Shoes.
W-155-QM-ECW-71	January 7, 1937	Shoes.
W-155-QM-7379	March 22, 1937	Leather Boots.
W-155-QM-ECW-120	March 25, 1937	Shoes.
W-155-QM-ECW-131	June 21, 1937	Shoes.
W-155-QM-ECW-152	June 21, 1937	Leather Boots.
W-155-QM-ECW-173	June 30, 1937	Shoes.
No. 3687	August 25, 1937	Gymnasium Shoes.
W-155-QM-CIV-35	October 9, 1937	Shoes.
No. 3688	March 6, 1938	Gymnasium Shoes.
W-155-QM-4222	March 21, 1938	Leather Boots.
W-155-QM-CIV-96	May 18, 1938	Shoes.
W-155-QM-CIV-118	May 31, 1938	Arctic Overshoes.
W-155-QM-CIV-125	June 6, 1938	Shoes.

Each of said contracts was for an amount in excess of \$10,000, and each of said contracts specifically included the representations and stipulations required by said Act of June 30, 1936.

5. On December 21, 1937, effective with respect to contracts awarded on or after 15 days thereafter, and more than 15 days prior to the award of contracts W-155-QM-8232; W-155-QM-CIV-96, and W-155-QM-CIV-125, the Secretary of Labor in accordance with and under the authority of secs. 1 (b) and 4 of said Act determined that the minimum wage for employees engaged in the performance of contracts with agencies of the United States Government subject to the provisions of such Act, for the manufacture or supply of men's welt shoes be 40 cents per hour, or \$16.00 per week for a week of 40 hours, and each of such three contracts contained a stipulation, as required by section 1 (b) of said Act, that all persons employed by the defendant in performance of said contracts be paid not less than said minimum wage, without subsequent deduction or rebate on any account, the same being contracts for the manufacture and supply of men's welt shoes.

6. Following an investigation by representatives of the Department of Labor, and it having appeared to the plaintiff upon the basis of such investigation that defendant Endicott Johnson Corporation had breached certain provisions of the 15 contracts hereinabove referred to and violated the said Act of June 30, 1936, the plaintiff caused the issuance of an amended complaint entitled "In the Matter of Endicott Johnson Corporation," in substitution for an original complaint previously issued, charging the defendant Endicott Johnson Corporation with breach of certain representations and stipulations of said 15 contracts, and with violation of certain provisions of said Act and

regulations promulgated thereunder. A copy of said amended complaint was duly served upon the defendant Endicott Johnson Corporation and, following the filing by it of an answer thereto, the said defendant was duly notified that a hearing upon the matters in issue would commence on December 13, 1939, in the Post Office Building at Binghamton, New York, before William A. McIlwaine, Examiner of the Division of Public Contracts of the United States Department of Labor, duly designated and directed by order of the plaintiff to preside at said hearing.

7. Said amended complaint, among other things, charges that during the following specified periods, defendant Endicott Johnson Corporation permitted and required persons employed by it in its following specified factories or departments, in the performance of the following specified contracts, to work in excess of 40 hours per week and in excess of 8 hours per day, and that it has failed and refused to pay to said persons for such excess hours the overtime rate of one and one-half times the basic hourly rate of pay received by said persons as required by said contracts, by Section 1 of the said Act, and by Articles 1 and 103 of the Regulations of the Secretary of Labor, duly promulgated under the provisions of Sections 4 and 6 of said Act:

7	Period	Factory or department	Contract
	March 22, 1937, to August 11, 1937	Calhoun Tannery	W-125-QM-7373
	March 24, 1938, to June 1, 1938	Calhoun Tannery	W-125-QM-9232
	October 26, 1939, to September 21, 1939	Upper Leather Tannery	W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
	October 26, 1939, to October 11, 1939	Sole Leather Tannery	W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-125-QM-ECW-120
			W-125-QM-ECW-134
			W-125-QM-ECW-133
			W-125-QM-ECW-176
			W-125-QM-CIV-32
			W-125-QM-CIV-42
			W-125-QM-CIV-125
			W-125-QM-ECW-49
			W-125-QM-ECW-61
			W-125-QM-ECW-73
			W-

8. Said amended complaint, among other things, also charges that during the period from April 16, 1938, to October 11, 1938, defendant Endicott Johnson Corporation failed and refused to pay to the persons employed by it in its Sole Cutting Department (Endicott), Sole Cutting Department (Johnson City), Counter Department (Johnson City), and its Carton Department (Johnson City) in performance of contracts W-155-QM-8232, W-155-QM-CIV-96, and W-155-QM-CIV-125, minimum wages of not less than forty cents per hour or sixteen dollars per week of 40 hours, as required by said contracts, by Section 1 of said Act and by Article 1 of said Regulations.

9. Plaintiff has reason to believe, and said amended complaint alleges, that the persons employed by defendant Endicott Johnson Corporation, during the periods specified in paragraphs 7 and 8 hereof, in its Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery, Paracord Factory, Sole Cutting Department (Endicott), Sole Cutting Department (Johnson City), Counter Department (Johnson City), and Carton Department (Johnson City) were employed by it in performance of the contracts specified in said paragraphs 7 and 8, which allegations said defendant denies in its answer to said amended complaint. Plaintiff is empowered by said Act to make investigations and inquiries as to the matters set forth in the amended complaint, including the matters so denied, to hold hearings with respect thereto, and to make findings of fact with respect thereto after notice and hearing, which findings will be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, will be conclusive in any court of the United States; and the plaintiff is further authorized to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of said Act. The said hearing, commenced on December 13, 1939, is a hearing on all matters in issue, including not only the issue as to whether said persons were employed in the performance of said contracts but also the issue whether, if they were so employed, the representations and stipulations of such contracts, and the said Act and the said Regulations were breached by the defendant Endicott Johnson Corporation, and if so, to what extent.

10. Said amended complaint alleges that the acts and omissions on the part of defendant Endicott Johnson Corporation therein set forth constitute breaches of each of said fifteen contracts, and violations of said Act, whereby said defendant has become liable and indebted to the United States in an amount equal to the sum of all the underpayments for excess hours and underpayments of minimum wages therein alleged, as provided in Section 2 of said Act; that said defendant has become subject to the provisions of said Section 2 authorizing cancellation

of said contracts; and that said defendant is subject to the provisions of Section 3 of said Act, whereby said defendant, and any firm, corporation, partnership, or association in which said defendant may have a controlling interest may be excluded from participation in any contract with the United States until three years shall have elapsed from the date of the determination of any such breach or violation.

11. At plaintiff's direction subpoenas *duces tecum* were duly executed by Charles V. McLaughlin, Assistant Secretary of Labor of the United States and duly served upon each of the defendants herein, requiring each of them to appear before said William A. McIlwaine, Examiner of the Division of Public Contracts of the United States Department of Labor in the Post Office Building in the City of Binghamton, New York, on the 13th day of December, 1939, at ten o'clock in the forenoon, then and there to testify for and in behalf of the United States of America in that cause entitled "In the Matter of Endicott Johnson Corporation," and further requiring each of them to bring with them to be produced at said time and place all time cards, time books, employees' wage statements, and payroll records showing the hours worked each day and week by, and the wages paid each wage period to, persons employed by defendant Endicott Johnson Corporation in the factories or departments and for the periods specified in said subpoenas. All the factories or departments so specified were those in which, according to the allegations of said amended complaint,

10 during the periods specified, the said 15 contracts were performed, and the employees covered by said cards, books, statements, and records were, according to the allegations of said amended complaint, the persons employed by the defendant corporation during the period specified in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of said 15 contracts. True copies of said subpoenas, showing due service thereof as attested by the returns executed on the reverse side thereof of the officer who effected such service, are attached hereto as Exhibits "A" and "B."

12. The defendants appeared in response to said subpoenas through the defendant Howard A. Swartwood, but wholly failed and refused to obey so much of such subpoenas as required them to bring with them and to produce all time cards, time books, employees' wage statements, and payroll records showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the defendant Endicott Johnson Corporation in the factories or departments and for the periods hereinafter specified:

Calfskin Tannery, March 22, 1937, to August 11, 1937; March 24, 1938, to June 1, 1938; Upper Leather Tannery, October 26, 1936, to September 21, 1938; Sole Leather Tannery, October 26, 1936, to October 11, 1938; Paracord Factory, October 26, 1936, to October 11, 1938; Sole Cutting Department (Endicott), October 26, 1936, to October 11, 1938; Sole Cutting Department (Johnson City), October 26, 1936, to October 11, 1938; Counter Department (Johnson City), October 26, 1936, to October 11, 1938; Carton Department (Johnson City), October 26, 1936, to October 11, 1938.

The employees, factories or departments, and periods covered by said cards, books, statement, and records are the same employees, factories or departments and periods referred to in the above paragraphs 7, 8, and 9.

13. All the cards, books, statements, and records referred to in paragraph 12 above are within the possession, custody, and control of the defendants, and are relevant, material, and necessary to determine whether or not the employees covered thereby were, during the periods specified, permitted or required by defendant

Endicott Johnson Corporation to work in excess of eight
11 hours per day or in excess of forty hours per week, and whether or not the said defendant failed or refused to pay to said persons for such excess hours the overtime rate of one and one-half times the basic rate of pay received by said persons, and whether or not said defendant failed or refused to pay to such persons minimum wages of not less than forty cents per hour or sixteen dollars per week of forty hours. Plaintiff desires to make such determinations in the same proceeding and on the basis of the same hearing in which the other matters in issue on the said amended complaint are determined, including the issue whether said persons were during the specified periods employed in the performance of said contracts.

Wherefore, plaintiff demands and makes application:

(a) That an order issue to the defendants requiring them to appear before plaintiff or a representative designated by the plaintiff to produce as and when so ordered the cards, books, statements, and records referred to in paragraph 12 above, and to give testimony relating thereto.

(b) That plaintiff have such other and further relief as is just.

RALPH L. EMMONS,

*United States Attorney for the
Northern District of New York.*

12 DISTRICT OF COLUMBIA, ss:

Gerard D. Reilly, being first duly sworn according to law, on oath deposes and says that he is the Solicitor of the United

States Department of Labor; that he has read the foregoing complaint and application and knows the contents thereof; that the matters and things stated therein are true and correct of his own knowledge, except as to those matters and things alleged on information and belief and, as to those he believes them to be true.

GERARD D. REILLY.

Subscribed and sworn to before me this 9th day of January 1940.

J. C. WATTS,
Notary Public in and for the
District of Columbia.

My commission expires May 14, 1944.

13 *Exhibit "A" Annexed to Complaint and Application*

UNITED STATES OF AMERICA

U. S. DEPARTMENT OF LABOR

DIVISION OF PUBLIC CONTRACTS

Subpena Duces Tecum

To ENDICOTT JOHNSON CORPORATION, *Endicott, New York:*

You are hereby required to appear before William A. McIlwaine examiner of the Division of Public Contracts of the United States Department of Labor in the Post Office Building, in the city of Binghampton, N. Y., on the 13th day of December, 1939, at 10:00 o'clock in the forenoon, then and there to testify for and in behalf of the United States of America in a certain cause entitled: In the matter of Endicott Johnson Corporation, you are further required to bring with you, to be produced at the time and place above set forth the following: All time cards, time books, employees' wage statements and pay-roll records showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation in the factories or departments and for the periods specified:

George F. Tabernacle Factory—October 26, 1936 to October 11, 1938.

Jigger Factory—March 15, 1938 to April 4, 1938.

Sunrise Factory—May 31, 1938 to September 29, 1938.

Scout Factory—June 10, 1937 to September 10, 1937.

Jigger Factory—August 12, 1937 to December 14, 1937.

Calfskin Tannery—March 22, 1937 to August 11, 1937; March 24, 1938 to June 1, 1938.

Upper Leather Tannery—October 26, 1936 to September 21, 1938.

Sole Leather Tannery—October 26, 1936 to October 11, 1938.

Paracord Factory—October 26, 1936 to October 11, 1938.

Sole Cutting Department (Endicott), Sole Cutting Department (Johnson City)—October 26, 1936 to October 11, 1938.

Counter Department (Johnson City)—October 26, 1936 to October 11, 1938.

Carton Department (Johnson City)—October 26, 1936 to October 11, 1938.

Fail not at your peril:

In testimony whereof, the undersigned, the Assistant to the Secretary, by direction of the Secretary of Labor, has hereunto set his hand and caused the seal of the Department of Labor to be affixed at Washington, D. C., this 5th day of December 1939.

[SEAL DEPARTMENT OF LABOR]

C. V. McLAUGHLIN,
Assistant Secretary.

NOTICE TO WITNESS—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

14 *Reverse side of Exhibit "A" Annexed to Complaint and Application*

STATE OF NEW YORK,
County of Oneida.

Jesse Jacobs, being duly sworn, deposes and says:

That I am United States Marshal for the Northern District of New York; that I received the within writ at Utica, N. Y., on December 6, 1939, and in obedience thereto I served the same on the therein named Endicott Johnson Corporation, by handing to and leaving a true and correct thereof [sic] thereof, with Howard A. Swartwood, Secretary, of the Endicott Johnson Corporation

Title

personally, at Endicott, N. Y., in said district, on the 7th day of December 1939.

JESSE JACOBS.

Sworn to before me at Utica, N. Y., this 9th day of December 1939.

ESTELLA K. SMITH,
Notary Public, Oneida Co.

UNITED STATES OF AMERICA

U. S. DEPARTMENT OF LABOR

DIVISION OF PUBLIC CONTRACTS

Subpena Duces Tecum

To HOWARD A. SWARTWOOD, *Secretary,*

Endicott Johnson Corporation, Endicott, N. Y.

You are hereby required to appear before William A. McIlwaine examiner of the Division of Public Contracts of the United States Department of Labor in the Post Office Building, in the city of Binghamton, N. Y., on the 13th day of December 1939, at 10:00 o'clock in the forenoon, then and there to testify for and in behalf of the United States of America in a certain cause entitled: In the matter of Endicott Johnson Corporation, you are further required to bring with you, to be produced at the time and place above set forth the following: All time cards, time books, employees' wage statements and pay roll records showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation in the factories or departments and for the periods specified:

George F. Tabernacle Factory—October 26, 1936 to October 11, 1938.

Jigger Factory—March 15, 1938 to April 4, 1938.

Sunrise Factory—May 31, 1938 to September 29, 1938.

Scout Factory—June 10, 1937 to September 10, 1937.

Jigger Factory—August 12, 1937 to December 14, 1937.

Calfskin Tannery—March 22, 1937 to August 11, 1937; March 24, 1938 to June 1, 1938.

Upper Leather Tannery—October 26, 1936 to September 21, 1938.

Sole Leather Tannery—October 26, 1936 to October 11, 1938.

Paracord Factory—October 26, 1936 to October 11, 1938.

Sole Cutting Department (Endicott), Sole Cutting Department (Johnson City)—October 26, 1936 to October 11, 1938.

Counter Department (Johnson City)—October 26, 1936 to October 11, 1938.

Carton Department (Johnson City)—October 26, 1936 to October 11, 1938.

Fail not at your peril:

In testimony whereof, the undersigned, the Assistant to the Secretary, by direction of the Secretary of Labor, has hereunto

set his hand and caused the seal of the Department of Labor to be affixed at Washington, D. C., this 2d day of December 1939.

[SEAL DEPARTMENT OF LABOR]

C. V. McLAUGHLIN,
Assistant Secretary.

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

16 *Reverse side of Exhibit "B" Annexed to Complaint and Application*

STATE OF NEW YORK,
County of Oneida.

Jesse Jacobs, being duly sworn, deposes and says:

That I am United States Marshal for the Northern District of New York; that I received the within writ at Utica, N. Y., on December 6, 1939, and in obedience thereto I served the same on the therein named Howard A. Swartwood, Secretary, by handing to and leaving a true and correct copy thereof, with Howard A. Swartwood, Secretary, of Endicott Johnson Corporation, personally, at Endicott, N. Y., in said district, on the 7th day of December 1939.

JESSE JACOBS.

Sworn to before me at Utica, N. Y., this 9th day of December 1939.

ESTELLA K. SMITH,
Notary Public, Oneida Co.

17 *Answer*

(Filed February 21, 1940)

District Court of the United States for the Northern District of New York

Civil Action, File Number 353

FRANCES PERKINS, SECRETARY OF LABOR OF THE UNITED STATES,
PLAINTIFF

vs.

ENDICOTT JOHNSON CORPORATION, A CORPORATION, AND HOWARD A. SWARTWOOD, SECRETARY, ENDICOTT JOHNSON CORPORATION,
DEFENDANTS

ANSWER

Defendants answering the complaint and application in the above entitled matter:

First. Admit the allegations contained in Paragraph numbered "1." of said complaint and application.

Second. Admit that the defendant, Endicott Johnson Corporation, is a New York corporation having its principal office, place of business and manufacturing establishments located as alleged in Paragraph numbered "2." of said complaint and application, and that the defendant, Endicott Johnson Corporation, has been engaged in manufacturing and furnishing shoes, leather boots, gymnasium shoes and artic overshoes as alleged in Paragraph numbered "4." of said complaint and application.

Third. Admit that the defendant, Howard A. Swartwood, has been secretary of the defendant, Endicott Johnson Corporation, since December 7, 1936.

Fourth. Admit the allegations contained in Paragraph numbered "4." of said complaint and application.

Fifth. Admit the allegations contained in Paragraph numbered "5." of said complaint and application except that defendants deny the allegation contained in said Paragraph numbered "5." of said complaint and application—"that all persons employed by the defendant (Endicott Johnson Corporation) in performance of said contracts be paid not less than said minimum wage, without subsequent deduction or rebate on any account."

Sixth. Admit the allegations contained in Paragraph numbered "6." of said complaint and application except that defendants deny they have any knowledge or information sufficient to form a belief as to the allegations contained in said Paragraph numbered "6." that "Following an investigation by representatives of the Department of Labor, and it having appeared to the plaintiff upon the basis of such investigation that defendant, Endicott Johnson Corporation had breached certain provisions of the 15 contracts hereinabove referred to and violated the said Act of June 30, 1936,"; and defendants attach hereto a copy of defendant Endicott Johnson Corporation's answer to said amended complaint which was filed as alleged in said Paragraph numbered "6." of said complaint and application, which copy of answer is marked Exhibit "A" and made a part hereof.

Seventh. Admit that Paragraphs numbered "XI." "XII." "XIII." "XIV." "XV." and "XVI." of the amended complaint referred to in Paragraph numbered "7." of said complaint and application herein, contains among other things, the allegations set forth in said Paragraph numbered "7." but deny each and every one of said allegations by repeating and realleging the denials set forth in Paragraphs numbered "Twelfth," "Thirteenth," "Fourteenth," "Fifteenth," and "Eighteenth" of the defendant Endicott Johnson Corporation's answer to said amended complaint, a copy of which answer is attached hereto, marked Exhibit "A" and made a part hereof.

Eighth. Admit that Paragraph numbered "XVI." of the amended complaint referred to in Paragraph numbered "8." of said complaint and application herein, contains the allegations specified in said Paragraph numbered "8." but deny each and every one of said allegations by repeating and realleging the denials set forth in Paragraph numbered "Eighteenth" of the defendant Endicott Johnson Corporation's answer to said amended complaint, a copy of which answer is attached hereto, marked Exhibit "A" and made a part hereof.

19 Ninth. Admit that the amended complaint referred to in Paragraph numbered "9." of said complaint and application herein alleges that the persons employed by the defendant Endicott Johnson Corporation, during the periods specified in Paragraphs numbered "7." and "8." of said complaint and application, in its Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery, Paracord Factory, Sole Cutting Department (Endicott), Sole Cutting Department (Johnson City), Counter Department (Johnson City) and Carton Department (Johnson City) were employed in the performance of the contracts specified in said Paragraphs numbered "7." and "8." of said complaint and application, but deny each and every one of said allegations and that plaintiff has reason to believe said allegations; and further deny that plaintiff is empowered by said Act to make any investigations, inquiries, findings of fact or decisions or hold any hearings with respect to hours and wages of persons employed in any of the tanneries, factories or departments mentioned in said Paragraph numbered "9." of said complaint and application; and further deny that the hearing commenced December 13, 1939, is a hearing of any matter in issue with respect to hours and wages of persons employed in any of the tanneries, factories or departments mentioned in said Paragraph numbered "9." of said complaint and application.

Tenth. Admit that Paragraph numbered "XVII." of the amended complaint referred to in Paragraph numbered "10." of said complaint and application herein contains the allegations set forth in said Paragraph numbered "10." but deny each and every one of said allegations by repeating and realleging the denial set forth in Paragraph numbered "Twentieth" of defendant Endicott Johnson Corporation's answer to such amended complaint, a copy of which answer is attached hereto, marked Exhibit "A" and made a part hereof.

Eleventh. Admit the allegations contained in Paragraph numbered "11." of said complaint and application.

Twelfth. Admit the allegations contained in Paragraph numbered "12." of said complaint and application.

Thirteenth. Admit that the cards, books, statements and records referred to in Paragraph numbered "12." of said complaint and application are within the possession, custody and control of the defendants as alleged in Paragraph numbered "13." thereof, but deny each and every other allegation contained in said Paragraph numbered "13." thereof, except that defendants admit the allegations contained in the last sentence of said Paragraph numbered "13." of said complaint and application.

Fourteenth. As a first and separate defense to the alleged breaches and violations set forth in Paragraph numbered "6." of said complaint and application, defendants allege as follows:

1. That the defendant Endicott Johnson Corporation is a manufacturer of leather, canvas and rubber footwear; a manufacturer of leather; a manufacturer of rubber heels and soles; a manufacturer of cut leather soles, including outsoles, middlesoles and innersoles; a manufacturer of counters; and a manufacturer of cartons. The establishments and plants of defendant, Endicott Johnson Corporation, at Binghamton, Johnson City, Endicott, and Owego, New York, consist of numerous and separate footwear factories, numerous and separate tanneries, rubber mills and separate and distinct departments for the manufacture of cut soles, counters, and cartons. It is approximately 18 miles from Binghamton to Owego; approximately 9 miles from Binghamton to Endicott and approximately 2 miles from Binghamton to Johnson City. Defendant Endicott Johnson Corporation's leather footwear factories are located in all of the communities mentioned; its tanneries are all located at Endicott; its rubber mills for the manufacture of heels and soles are all located at Johnson City; its canvas and rubber footwear factories are all located at Johnson City; its sole cutting departments are located at Johnson City and Endicott; its counter department is located at Johnson City, and its carton departments are located at Johnson City and Endicott.

2. All of the leather shoes and leather boots furnished by defendant Endicott Johnson Corporation under all of the contracts mentioned in Paragraph numbered "4." of the said complaint and application were manufactured in its George F. Tabernacle Factory at Binghamton, except the leather boots furnished under Contract No. W-155-QM-ECW-153, which were manufactured in its Scout Factory at Johnson City. All of the gymnasium shoes furnished under Contracts Nos. 56487 and 59536 were manufactured in its Jigger Factory at Johnson City. All of the arctic overshoes furnished under Contract No. W-155-QM-CIV-118 were manufactured in its Sunrise Factory at Johnson City.

3. Of the cut leather outsoles, middle soles and/or inner soles used in the manufacture of the leather shoes furnished by defendant Endicott Johnson Corporation under Contracts Nos. W-155-QM-ECW-49, W-155-QM-ECW-66, W-155-QM-ECW-75, W-155-QM-7379, W-155-QM-ECW-190, W-155-QM-ECW-154, W-155-QM-ECW-153, W-155-QM-ECW-176, W-155-QM-CIV-90, W-155-QM-8232, W-155-QM-CIV-96, and W-155-QM-CIV-125 a portion were manufactured in its Sole Cutting Department at Endicott and the balance were purchased from other suppliers or were manufactured in its Sole Cutting Department at Johnson City.

All of the rubber heels and soles used in the manufacture of the leather shoes furnished by defendant Endicott Johnson Corporation under the 12 contracts hereinbefore enumerated in this subparagraph were manufactured in its Paracord Factory at Johnson City.

All of the counters used in the manufacture of the leather shoes and leather boots furnished by defendant Endicott Johnson Corporation under the 12 contracts hereinbefore enumerated in this subparagraph were manufactured in its Counter Department at Johnson City.

All of the cartons used by defendant Endicott Johnson Corporation in furnishing leather shoes, leather boots, gymnasium shoes and arctic overshoes under the 15 contracts enumerated in Paragraph numbered "4." of the said complaint and application were manufactured in its Carton Department at Johnson City.

4. That during the performance of all of the contracts enumerated in subparagraph 3 of this paragraph of this answer and since the complete performance thereof, all of defendant Endicott Johnson Corporation's records of employment and pay roll records relating to said George F. Tabernacle Factory and said

22 Scout Factory have been at all times available for inspection and as defendants are informed and believe, have been on numerous occasions examined and checked by various representatives of the Division of Public Contracts of the United States Department of Labor.

5. That in the performance of the 12 contracts enumerated in subparagraph 3. of this paragraph of this answer, for furnishing leather shoes manufactured in its George F. Tabernacle Factory at Binghamton and leather boots manufactured in its Scout Factory at Johnson City, defendant Endicott Johnson Corporation duly, faithfully and fully complied with all of the stipulations and requirements of the Act of June 30, 1936 (49 Stat. 2036) and the rulings and regulations of the Secretary of Labor; and in the performance of Contracts Nos. W-155-QM-8232, W-155-QM-

CIV-96 and W-155-QM-CIV-125 also duly, faithfully, and fully complied with the requirements of the order of the Secretary of Labor determining and establishing a minimum wage of 40 cents per hour or \$16.00 per week for a week of 40 hours, for employees engaged in the manufacture of men's welt shoes in said George F. Tabernacle Factory at Binghamton and in said Scout Factory at Johnson City.

6. That during the performance of Contracts No. 56487 and 59536 for furnishing gymnasium shoes manufactured in its Jigger Factory and during the performance of Contract No. W-155-QM-CIV-118 for furnishing arctic overshoes manufactured in its Sunrise Factory and since the complete performance thereof, all of defendant Endicott Johnson Corporation's records of employment and pay roll records relating to said Jigger Factory and said Sunrise Factory have been at all times available for inspection and, as defendants are informed and believe, have been on numerous occasions examined and checked by various representatives of the Division of Public Contracts of the United States Department of Labor.

7. That in the performance of the 3 contracts enumerated in subparagraph 6. of this paragraph of this answer, for furnishing gymnasium shoes manufactured in its Jigger Factory at Johnson City and for furnishing arctic overshoes manufactured in its Sunrise Factory at Johnson City, defendants duly, faithfully and fully complied with all of the stipulations and requirements of the Act of June 30, 1936 (49 Stat. 2036) and the rulings and regulations of the Secretary of Labor.

Fifteenth. As a first and separate defense to the alleged breaches and violations set forth in Paragraphs numbered "7," "8," "9," and "10." of said complaint and application, with respect to its Calfskin Tannery, its Upper Leather Tannery, its Sole Leather Tannery and its Paracord Factory, defendants allege:

1. Repeat and reiterate all of the allegations set forth in subparagraphs 1, 2, and 3 of Paragraph "Fourteenth" of this answer.

2. That as a manufacturer of leather in its tanneries (Calfskin, Upper Leather and Sole Leather) at Endicott and as a manufacturer of rubber or rubber soles and/or heels in its rubber mills (Paracord Factory) at Johnson City, defendant Endicott Johnson Corporation was not at any time during the performance of any of the contracts for the manufacture of leather shoes, leather boots, gymnasium shoes, and arctic overshoes enumerated in Paragraph numbered "4." of the complaint and application, a manufacturer as defined in Regulations 504, Article 101, (a) because in the operation of said tanneries and rubber mills (Paracord Factory) it was not engaged in producing on the premises

articles of the general character described by the specifications in said footwear contracts; (b) because the legislative history of the Act of June 30, 1936 (40 Stat. 2036) indicates that the Congress intended the provisions of the Act to apply only to the actual manufacture of articles of the general character described in the specification contained in said contracts (shoes, gymnasium shoes and arctic overshoes) and not the tanning of leather or the manufacture of rubber or rubber soles and/or heels.

3. That neither under the Act of June 30, 1936 (49 Stat. 2036) nor under the stipulations contained in any of the contracts for the manufacture of footwear enumerated in Paragraph numbered "4." of the complaint and application, was or is defendant Endicott Johnson Corporation as a manufacturer of leather and/or as a manufacturer of rubber or rubber soles and/or heels, under any obligation to maintain, keep on file, or make available for inspection records of employment or pay roll

24 records of its said tanneries at Endicott or its rubber mills (Paracord Factory) at Johnson City; and that the Division of Public Contracts of the United States Department of Labor and the Secretary of Labor were and are without jurisdiction or authority to require defendant Endicott Johnson Corporation to maintain, keep on file or make available for inspection records of employment or pay roll records of its tanneries at Endicott or its rubber mills (Paracord Factory) at Johnson City either under the Act of June 30, 1936 or under the stipulations contained in any of the contracts for the manufacture of footwear enumerated in Paragraph numbered "4." of the complaint and application, or under any Regulation or Ruling of the Secretary of Labor or of the Administrator of the Division of Public Contracts of the Department of Labor.

4. That the Ruling of the Administrator of the Division of Public Contracts of the United States Department of Labor that the operations of defendant Endicott Johnson Corporation as a manufacturer of leather in tanneries at Endicott and as a manufacturer of rubber, rubber soles and/or heels at Johnson City are subject to the provision of said Act set forth as stipulations in defendant Endicott Johnson Corporation's contracts to manufacture leather shoes, leather boots, gymnasium shoes and arctic overshoes in factories and premises miles distant from the place of manufacture of said leather and rubber, rubber soles and/or heels is arbitrary, artificial, unreasonable, discriminatory, and capricious.

Sixteenth. As a second and separate defense to the alleged breaches and violations set forth in Paragraphs numbered "7." "8." "9." and "10." of said complaint and application with respect

to its Sole Cutting Departments (Endicott and Johnson City), Counter Department (Johnson City) and Carton Department (Johnson City), defendants allege as follows:

1. Repeat and reiterate all of the allegations set forth in subparagraphs 1., 2. and 3. of Paragraph "Fourteenth" of this answer.

2. That as a manufacturer of cut leather soles including outsoles, middle soles, and innersoles at Johnson City and Endicott;

as a manufacturer of counters at Johnson City; as a manu-

25 facturer of cartons at Johnson City, defendant Endicott

Johnson Corporation was not at any time during the performance of any of the contracts for the manufacture of leather shoes, leather boots, gymnasium shoes and arctic overshoes enumerated in Paragraph numbered "4." of said complaint and application, a manufacturer as defined in Regulations 504, Article 101, (a) because in the operation of said Sole Cutting Departments, Counter Department and Carton Department it was not engaged in producing on the premises articles of the general character described by the specifications in said footwear contracts; (b) because the legislative history of the Act of June 30, 1936 (49 Stat. 2036) indicates that the Congress intended the provisions of the Act to apply only to the actual manufacture of articles of the general character described in the specifications contained in said contracts (shoes, leather boots, gymnasium shoes and arctic overshoes) and not to the manufacture of cut soles, counters or cartons.

3. That neither under the Act of June 30, 1936 (49 Stat. 2036) nor under the stipulations contained in any of the contracts for the manufacture of footwear enumerated in Paragraph numbered "4." of said complaint and application, was or is defendant Endicott Johnson Corporation as a manufacturer of cut leather soles, including outsoles, middle soles and innersoles, or as a manufacturer of counters, or as a manufacturer of cartons under any obligation to maintain, keep on file, or make available for inspection records of employment or pay roll records of its Sole Cutting Departments, Counter Department, or Carton Department; and that the Division of Public Contracts of the United States Department of Labor and the Secretary of Labor were and are without jurisdiction or authority to require defendant Endicott Johnson Corporation to maintain, keep on file or make available for inspection records of employment or pay roll records for its Sole Cutting Departments, Counter Department or Carton Department either under the Act of June 30, 1936, or under the stipulations contained in any of the contracts for the manufacture of footwear enumerated in Paragraph "4." of said complaint and application, or under any Regulation or Ruling of the Secretary

of Labor or of the Administrator of the Division of Public Contracts of the Department of Labor.

26 4. That the Ruling of the Administrator of the Division of Public Contracts of the United States Department of Labor, that the operations of defendant Endicott Johnson Corporation as a manufacturer of cut leather poles, as a manufacturer of counters and as a manufacturer of cartons are subject to the provisions of the Act set forth as stipulations in defendant's contracts to manufacture leather shoes, leather boots, gymnasium shoes and arctic overshoes is arbitrary, artificial, unreasonable, discriminatory and capricious.

Seventeenth. As a first and separate defense to the alleged failure and refusal of defendants to obey the subpoenas duces tecum mentioned in Paragraph numbered "11." of the complaint and application herein, as set forth in Paragraph numbered "12." thereof, defendants allege as follows:

1. Repeat and reiterate all of the allegations set forth in Paragraphs numbered "Fourteenth," "Fifteenth," and "Sixteenth" of this answer.

2. The subpoenas duces tecum issued by C. V. McLaughlin, Assistant Secretary of Labor, to Endicott Johnson Corporation and to Howard A. Swartwood, Secretary, required the production at the hearing of December 13, 1939, of three separate and distinct classes or groups of pay-roll records.

I. The first class or group of pay-roll records required to be produced under such subpoenas contains:

(a) Records of George F. Tabernacle Factory at Binghamton, N. Y. in which Endicott Johnson Corporation manufactured and furnished to the United States Government men's leather welt shoes and boots under the following contracts:

1. Contract No. W-155-QM-ECW-49, the specifications of which described the general character of such shoes as "Service, Special Type 'B'."

2. Contract No. W-155-QM-ECW-66, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

27 3. Contract No. W-155-QM-ECW-75, the specifications of which described the general character of such shoes as "Service, Special Type 'E'."

4. Contract No. W-155-QM-7379, the specifications of which described the general character of such boots as "Boots, leather, laced, Special Type 'J' for mounted enlisted men."

5. Contract No. W-155-QM-ECW-120, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

6. Contract No. W-155-QM-ECW-154, the specifications of which described the general character of such shoes as "Service, Special Type 'B'."

7. Contract No. W-155-QM-ECW-176, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

8. Contract No. W-155-QM-CIV-20, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

9. Contract No. W-155-QM-8232, the specifications of which described the general character of such boots as "Boots; leather, laced, Special Type 'J' for mounted enlisted men."

10. Contract No. W-155-QM-CIV-96, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

11. Contract No. W-155-QM-CIV-125, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

(b) Records of Scout Factory at Johnson City, N. Y. in which Endicott Johnson Corporation manufactured and furnished to the United States Government men's leather welt boots under Contract No. W-155-QM-ECW-153, the specifications of which described the general character of such boots as "Boots, leather, laced, welt, logger type, without caulks."

28 (c) Records of Jigger Factory at Johnson City, N. Y., in which Endicott Johnson Corporation manufactured and furnished to the United States Government canvas footwear under the following contracts:

1. Contract No. 56487, the specifications of which described the general character of such canvas footwear as "Gymnasium Shoes."

2. Contract No. 59536, the specifications of which described the general character of such canvas footwear as "Gymnasium Shoes."

(d) Records of Sunrise Factory at Johnson City, N. Y., in which Endicott Johnson Corporation manufactured and furnished to the United States Government rubber footwear under Contract No. W-155-QM-CIV-118, the specifications of which described the general character of such rubber footwear as "Overshoes, Arctic rubber top, Class 'B'."

During the performance and since the performance of all of the contracts hereinbefore enumerated for the furnishing of leather shoes and boots, gymnasium shoes and arctic overshoes, all of the pay-roll records of George F. Tabernacle Factory, Scout Factory, Jigger Factory and Sunrise Factory have been at all times available and open to inspection by representatives of the Division of Public Contracts of the United States Department of

Labor. In fact they have on numerous occasions been examined and checked by at least five representatives of such Division. They were not produced at the hearing on December 13, 1939, because of an agreement made between counsel for Endicott Johnson Corporation and counsel for the Division of Public Contracts that no evidence would be taken at that hearing with respect to any of the leather shoe and boot factories, gymnasium shoe factory or arctic overshoe factory. Representatives of the Corporation have stated to representatives of the Division of Public Contracts, on numerous occasions, that if any violations of the act of June 30, 1936 (49 Stat. 2036), known as the Walsh-Healey Act, were found in these factories they were without the knowledge or consent of the management of Endicott Johnson Corporation and that any alleged violations which were pointed out by the Division and could not be explained would be promptly adjusted without the necessity of any hearing.

II. The second class or group of pay-roll records required to be produced under such subpoenas contains:

- 29 (a) Records of Calfskin Tannery at Endicott, N. Y.
(b) Records of Upper Leather Tannery at Endicott, N. Y.

(c) Records of Sole Leather Tannery at Endicott, N. Y.

(d) Records of rubber mill for the manufacture of rubber and rubber soles and heels, known as Paracord Factory at Johnson City, N. Y.

The pay-roll records of the tanneries and rubber mill hereinbefore mentioned were not produced at the hearing of December 13, 1939, under said subpoenas. Endicott-Johnson Corporation has refused at all times and still refuses to make the pay-roll records of said tanneries and rubber mill available for inspection by representatives of the Division of Public Contracts of the United States Department of Labor because it contends:

1. That no person employed by it to manufacture leather in its Calfskin Tannery, Upper Leather Tannery or Sole Leather Tannery at Endicott, N. Y., or to manufacture rubber, rubber soles and heels in its rubber mill known as Paracord Factory at Johnson City, N. Y., was at any time engaged in the performance of any contract under which it manufactured leather shoes and leather boots in its George F. Tabernacle Factory at Binghamton, N. Y., and in its Scout Factory at Johnson City, N. Y., or under which it manufactured gymnasium shoes in its Jigger Factory at Johnson City, N. Y., or under which it manufactured arctic overshoes in its Sunrise Factory at Johnson City, N. Y.

2. That as a manufacturer of leather in its Calfskin Tannery, Upper Leather Tannery and Sole Leather Tannery at Endicott, N. Y., and as a manufacturer of rubber, rubber soles and heels in

its rubber mill known as Paracord Factory at Johnson City, it was not at any time, during the performance of any of the contracts to manufacture leather shoes, leather boots, gymnasium shoes and arctic overshoes, a manufacturer as defined in Regulations 504, Article 101, because—

(a) In the operation of said tanneries and rubber mill it was not engaged in producing on the premises articles of the general character described by the specifications in said footwear contracts and because,

30 (b) The legislative history of the Act of June 30, 1936

(49 Stat. 2036), known as Walsh-Healey Act, indicates that the Congress intended the provisions of the Act to apply only to the actual manufacture of articles of the general character described by the specifications contained in said contracts (i. e. leather shoes, leather boots, gymnasium shoes and arctic overshoes) and not to the tanning of leather or the manufacture of rubber or rubber soles and heels.

3. That neither under the Act of June 30, 1936 (49 Stat. 2036), known as Walsh-Healey Act, nor under the stipulations contained in any of its contracts for the manufacture of leather shoes, leather boots, gymnasium shoes or arctic overshoes, was or is it, as a manufacturer of leather or as a manufacturer of rubber or rubber soles and heels, under any obligation to maintain, keep on file or make available for inspection any records of employment or pay roll records of its tanneries at Endicott, N. Y., or its rubber mill at Johnson City, N. Y.

4. That the Division of Public Contracts of the United States Department of Labor and the Secretary of Labor were and are without jurisdiction or authority to require it to maintain, keep on file or make available for inspection records of employment or pay roll records of its tanneries at Endicott, N. Y., or its rubber mill at Johnson City, N. Y., either under the Act of June 30, 1936 (49 Stat. 2036), known as Walsh-Healey Act; or under the stipulations contained in any of its contracts for the manufacture of leather shoes, leather boots, gymnasium shoes or arctic overshoes; or under any Regulation or Ruling of the Secretary of Labor or the Division of Public Contracts of the Department of Labor.

5. That the Ruling of the Administrator of the Division of Public Contracts of the United States Department of Labor that its operations as a manufacturer of leather in its tanneries at Endicott, N. Y. and as a manufacturer of rubber, rubber soles and heels at Johnson City, N. Y. are subject to the provisions of the Act set forth as stipulations in its contracts to manufacture leather shoes, leather boots, gymnasium shoes and arctic over-

shoes in factories and premises miles distant from the place of manufacture of said leather and rubber, rubber soles and
31 heels, is arbitrary, artificial, unreasonable, discriminatory and capricious.

III. The third class or group of pay roll records required to be produced under such subpoenas contains:

(a) Records of Sole Cutting Departments at Johnson City and Endicott, N. Y.

(b) Records of Counter Department at Johnson City, N. Y.

(c) Records of Carton Department at Johnson City, N. Y.

The pay roll records of the Sole Cutting Departments, Counter Department and Carton Department were not produced at the hearing of December 13, 1939, under said subpoenas. Endicott Johnson Corporation has refused at all times and still refuses to make the pay roll records of said Sole Cutting Departments, Counter Department and Carton Department available for inspection by representatives of the Division of Public Contracts of the United States Department of Labor for the same reasons and upon the same grounds and contentions hereinbefore set forth in subparagraph II of this paragraph of this answer with respect to its tanneries and rubber mill.

Wherefore, defendants demand that said complaint and application be dismissed.

Dated February 21, 1940.

ENDICOTT JOHNSON CORPORATION,

By (Sgd.) B. L. BABCOCK, *Treasurer*.

(Sgd.) HOWARD A. SWARTWOOD,

HOWARD A. SWARTWOOD, (Sgd.)

Howard A. Swartwood,

WILLIAM H. PRITCHARD, (Sgd.)

William H. Pritchard,

Attorneys for defendants.

Office and Post Office Address, Sales Building, Endicott, N. Y.

32 STATE OF NEW YORK,

County of Broome, ss:

Bruce L. Babcock, being duly sworn deposes and says that he is the Treasurer of Endicott Johnson Corporation, one of the defendants in the foregoing action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

The reason why this affidavit is not made by the defendant is that it is a corporation.

(S) BRUCE L. BABCOCK.

Subscribed and sworn to before me this 22nd day of February 1940.

[SEAL]

(S) DOROTHY A. ROMBERGER,
Notary Public.

STATE OF NEW YORK,

County of Broome, ss:

Howard A. Swartwood, being duly sworn deposes and says that he is one of the defendants named in the foregoing action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

(S) HOWARD A. SWARTWOOD.

Subscribed and sworn to before me this 22nd day of February 1940.

[SEAL]

(S) DOROTHY A. ROMBERGER,
Notary Public.

33

Exhibit "A" Annexed to Answer

[Answer to amended complaint in administrative proceeding, set forth as Plaintiff's Exhibit 11]

UNITED STATES OF AMERICA

DIVISION OF PUBLIC CONTRACTS, DEPARTMENT OF LABOR

Number 208

IN THE MATTER OF ENDICOTT JOHNSON CORPORATION

ANSWER [TO AMENDED ADMINISTRATIVE COMPLAINT]

ANSWER

The respondent, Endicott Johnson Corporation, answering the amended complaint herein:

First. Admits the allegations contained in Paragraph numbered "I." of said amended complaint.

Second. Admits the allegations contained in Paragraph numbered "II." of said amended complaint.

Third. Admits the allegations contained in Paragraph numbered "III." of said amended complaint, except that respondent

denies the allegation contained in said Paragraph numbered "III",—"that all persons employed by respondent in performance of said contracts would be paid not less than said minimum wage, without subsequent deduction or rebate on any account."

Fourth. Denies each and every allegation contained in Paragraph numbered "IV." of said amended complaint.

Fifth. Denies each and every allegation contained in Paragraph numbered "V." of said amended complaint.

Sixth. Denies each and every allegation contained in Paragraph numbered "VI." of said amended complaint and in accordance with its first separate defense herein, alleges that it duly, faithfully and fully complied with all the stipulations

34 and requirements of the Act of June 30, 1936 (49 Stat. 2036) and the rulings and regulations of the Secretary of Labor regarding records of hours worked; and further alleges that its records of hours worked with respect to each of the contracts enumerated in said Paragraph numbered "VI." eliminate completely the breaches and violations charged in Paragraphs numbered "IV." and "V." of said amended complaint.

Seventh. Denies each and every allegation contained in Paragraph numbered "VII." of said amended complaint.

Eighth. Denies each and every allegation contained in Paragraph numbered "VIII." of said amended complaint.

Ninth. Denies each and every allegation contained in Paragraph numbered "IX." of said amended complaint.

Tenth. Denies each and every allegation contained in Paragraph numbered "X." of said amended complaint.

Eleventh. As a first and separate defense to the alleged breaches and violations set forth in Paragraphs numbered "IV." "V." "VI." "VII." "VIII." "IX." and "X." of said amended complaint with respect to its George F. Tabernacle Factory, its Jigger Factory, its Sunrise Factory and its Scout Factory, respondent alleges:

1. It is a manufacturer of leather, canvas, and rubber footwear; a manufacturer of leather; a manufacturer of rubber heels and soles; a manufacturer of cut leather soles, including outsoles, middlesoles and innersoles; a manufacturer of counters; a manufacturer of cut linings, and a manufacturer of cartons. The establishments and plants of respondent at Binghamton, Johnson City, Endicott and Owego, N. Y., consist of numerous and separate footwear factories, numerous and separate tanneries, rubber mills, and separate and distinct departments for the manufacture of cut soles, counters, cut linings and cartons: It is approximately 18 miles from Binghamton to Owego; approximately 9 miles from Binghamton to Endicott and approximately 2 miles
35 from Birmingham to Johnson City. Respondent's leather.

footwear factories are located in all of the communities mentioned; its tanneries are all located at Endicott; its rubber mills for the manufacture of heels and soles are all located at Johnson City; its canvas and rubber footwear factories are all located at Johnson City; its sole cutting departments are located at Johnson City and Endicott; its counter department is located at Johnson City; its lining departments are located at Johnson City and Endicott, and its carton departments are located at Johnson City and Endicott.

2. All of the leather shoes and leather boots furnished by respondent under all of the contracts mentioned in Paragraph numbered "II." of the amended complaint were manufactured in its George F. Tabernacle Factory at Binghamton, except the leather boots furnished under Contract No. W-155-QM-ECW-153, which were manufactured in its Scout Factory at Johnson City. All of the gymnasium shoes furnished under Contracts Nos. 56487 and 59536 were manufactured in its Jigger Factory at Johnson City. All of the Arctic overshoes furnished under Contract No. W-155-QM-CIV-118 were manufactured in its Sunrise Factory at Johnson City.

3. Of the cut leather outsoles, middle soles and/or inner soles used in the manufacture of the leather shoes furnished by respondent under Contracts Nos. W-155-QM-ECW-49, W-155-QM-ECW-66, W-155-QM-ECW-75, W-155-QM-7379, W-155-QM-ECW-120, W-155-QM-ECW-154, W-155-QM-ECW-153, W-155-QM-ECW-176, W-155-QM-CIV-20, W-153-QM-8232, W-155-QM-CIV-96, and W-155-QM-CIV-125 a portion were manufactured in its Sole Cutting Department at Endicott and the balance were purchased from other suppliers or were manufactured in its Sole Cutting Department at Johnson City.

All of the rubber heels and soles used in the manufacture of the leather shoes furnished by respondent under the 12 contracts hereinbefore enumerated in this subparagraph were manufactured in its Paracord Factory at Johnson City.

All of the counters used in the manufacture of the leather shoes and leather boots furnished by respondent under the 12 contracts hereinbefore enumerated in this subparagraph were manufactured in its Counter Department at Johnson City.

36 All of the cartons used by respondent in furnishing leather shoes, leather boots, gymnasium shoes and arctic overshoes under the 15 contracts enumerated in Paragraph numbered "II" of the amended complaint were manufactured in its Carton Department at Johnson City.

All of the welting used by respondent in the manufacture of the leather shoes furnished by respondent under the 12 contracts here-

inbefore enumerated in this subparagraph were purchased from outside suppliers because respondent manufactures no welting.

None of the leather shoes furnished by respondent under the 12 contracts hereinbefore enumerated in this subparagraph contained linings of any kind, except the leather boots furnished under Contract No. W-155-QM-ECW-153 which contained leather linings which were cut and made in its Scout Factory at Johnson City wherein said boots were manufactured.

4. That during the performance of all of the contracts enumerated in subparagraph 3 of this paragraph of its answer and since the complete performance thereof, all of respondent's records of employment and pay roll records relating to said George F. Tabernacle Factory and said Scout Factory have been at all times available for inspection and as respondent is informed and believes, have been on numerous occasions examined and checked by various representatives of the Division of Public Contracts of the United States Department of Labor.

5. That in the performance of the 12 contracts enumerated in subparagraph 3 of this paragraph of its answer, for furnishing leather shoes manufactured in its George F. Tabernacle Factory at Binghamton and leather boots manufactured in its Scout Factory at Johnson City, respondent duly, faithfully and fully complied with all of the stipulations and requirements of the Act of June 30, 1936 (49 Stat. 2036) and the rulings and regulations of the Secretary of Labor; and in the performance of Contracts Nos. W-155-QM-8232, W-155-QM-CIV-96 and W-155-QM-CIV-125 also duly, faithfully and fully complied with the requirements of the order of the Secretary of Labor determining and establishing a minimum wage of 40 cents per hour or \$16.00 per week for a week of 40 hours, for employees engaged in the manufacture of men's welt shoes in said George F. Tabernacle Factory at Binghamton and in said Scout Factory at Johnson City.

37 6. That during the performance of Contracts Nos. 56487 and 59536 for furnishing gymnasium shoes manufactured in its Jigger Factory and during the performance of Contract No. W-155-QM-CIV-118 for furnishing Arctic overshoes manufactured in its Sunrise Factory and since the complete performance thereof, all of respondent's records of employment and pay roll records relating to said Jigger Factory and said Sunrise Factory have been at all times available for inspection and, as respondent is informed and believes, have been on numerous occasions examined and checked by various representatives of the Division of Public Contracts of the United States Department of Labor.

7. That in the performance of the 3 contracts enumerated in subparagraph 6 of this paragraph of its answer, for furnishing

gymnasium shoes manufactured in its Jigger Factory at Johnson City and for furnishing Arctic overshoes manufactured in its Sunrise Factory at Johnson City, respondent duly, faithfully and fully complied with all of the stipulations and requirements of the Act of June 30, 1936 (49 Stat. 2036) and the rulings and regulations of the Secretary of Labor.

Twelfth. Denies that, as alleged in Paragraph numbered "XI." of said amended complaint, any person employed by respondent to manufacture leather in its Calfskin Tannery at Endicott was at any time engaged in the performance of Contracts Nos. W-155-QM-7379 or W-155-QM-8232 for the furnishing of leather boots made in its George F. Tabernacle Factory at Binghamton; and further denies that, as alleged in said Paragraph numbered "XI." of said amended complaint, respondent was at any time required by said Contracts Nos. W-155-QM-7379 or W-155-QM-8232 for the furnishing of leather boots made in its George F. Tabernacle Factory at Binghamton, or by Section 1 of the Act of June 30, 1936 (49 Stat. 2036), or by Articles 1 and 103 of the Regulations of the Secretary of Labor promulgated under the provisions of Sections 4 and 5 of said Act, to pay any persons employed by respondent to manufacture leather in its Calfskin Tannery at Endicott an overtime rate of one and one-half times the basic hourly rate of pay received by said persons, even though certain of said persons were required or permitted by respondent to work in excess of eight hours per day and in excess of forty hours per week.

38 Thirteenth. Denies that, as alleged in Paragraph numbered "XII." of said amended complaint, any person employed by respondent to manufacture leather in its Upper Leather Tannery at Endicott was at any time engaged in the performance of Contracts No. W-155-QM-ECW-49, No. W-155-QM-ECW-66, No. W-155-QM-ECW-75, No. W-155-QM-ECW-120, No. W-155-QM-ECW-154, No. W-155-QM-ECW-176, No. W-155-QM-CIV-20, No. W-155-QM-CIV-96, or No. W-155-QM-OIV-125 for the furnishing of leather shoes made in its George F. Tabernacle Factory at Binghamton, or engaged in the performance of Contract No. W-155-QM-ECW-153 for the furnishing of leather boots made in its Scout Factory at Johnson City; and further denies that, as alleged in said Paragraph numbered "XII." of said amended complaint, respondent was at any time required by any of said 9 contracts for the furnishing of leather shoes made in its George F. Tabernacle Factory at Binghamton, or by said contract for the furnishing of leather boots made in its Scout Factory at Johnson City, or by Section 1 of the Act of June 30, 1936 (49 Stat. 2036), or by

Articles 1 and 103 of the Regulations of the Secretary of Labor promulgated under the provisions of Sections 4 and 5 of said Act, to pay any persons employed by respondent to manufacture leather in its Upper Leather Tannery at Endicott an overtime rate of one and one-half times the basic hourly rate of pay received by said persons, even though certain of said persons were required or permitted by respondent to work in excess of eight hours per day and in excess of forty hours per week.

Fourteenth. Denies that, as alleged in Paragraph numbered "XIII." of said amended complaint, any person employed by respondent to manufacture leather in its Sole Leather Tannery at Endicott was at any time engaged in the performance of Contracts No. W-155-QM-ECW-49, No. W-155-QM-ECW-66, No. W-155-QM-ECW-75, No. W-155-QM-ECW-7379, No. W-155-QM-ECW-120, No. W-155-QM-ECW-154, No. W-155-QM-ECW-176, No. W-155-QM-CIV-20, No. W-155-QM-8232, No. W-155-QM-CIV-96, or No. W-155-QM-CIV-125 for the furnishing of leather shoes and leather boots made in its George F. Tabernacle Factory at Binghamton, or engaged in the performance of Contract No. W-155-QM-ECW-153 for furnishing leather boots made in its Scout Factory at Johnson City; and further denies that, as alleged in said Paragraph numbered "XIII." of said

39 amended complaint, respondent was at any time required by any of said 11 contracts for the furnishing of leather shoes and leather boots made in its George F. Tabernacle Factory at Binghamton, or by said contract for the furnishing of leather boots made in its Scout Factory at Johnson City, or by Section 1 of the Act of June 30, 1936 (49 Stat. 2036) or by Articles 1 and 103 of the Regulations of the Secretary of Labor promulgated under the provisions of Sections 4 and 5 of said Act, to pay any persons employed by respondent to manufacture leather in its Sole Leather Tannery at Endicott an overtime rate of one and one-half times the basic hourly rate of pay received by said persons, even though certain of said persons were required or permitted by respondent to work in excess of eight hours per day and in excess of forty hours per week.

Fifteenth. Denies that, as alleged in Paragraph numbered "XIV." of said amended complaint, any person employed by respondent to manufacture rubber, or rubber soles and/or heels in its Paracord Factory at Johnson City was at any time engaged in the performance of any of the contracts described and enumerated in Paragraph numbered "II" of said amended complaint, which contracts were for the furnishing of leather shoes and

leather boots made in its George F. Tabernacle Factory at Binghamton, leather boots made in its Scout Factory at Johnson City, gymnasium shoes made in its Jigger Factory at Johnson City and arctic overshoes made in its Sunrise Factory at Johnson City; and further denies that, as alleged in said Paragraph numbered "XIV" of said amended complaint, respondent was at any time required by any of said 15 contracts for the furnishing of leather shoes and leather boots made in its George F. Tabernacle Factory at Binghamton, leather boots made in its Scout Factory at Johnson City, gymnasium shoes made in its Jigger Factory at Johnson City and arctic overshoes made in its Sunrise Factory at Johnson City, or by Section 1 of the Act of June 30, 1936. (49 Stat. 2036), or by Articles 1 and 103 of the Regulations of the Secretary of Labor promulgated under the provisions of Sections 4 and 5 of said Act, to pay any persons employed by respondent to manufacture rubber or rubber soles and/or heels in its Paracord Factory at Johnson City an overtime rate of one and one-half times the basic hourly rate of pay received by such persons even though certain of said persons were required or permitted by respondent to work in excess of eight hours per day and in excess of forty hours per week.

Sixteenth. Denies that, as alleged in Paragraph numbered "XV." of said amended complaint, any person employed by respondent in its Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery and Paracord Factory was at any time engaged in the performance of the contracts set forth in Paragraphs numbered "XI," "XII," "XIII," and "XIV" of said amended complaint; and further denies that as alleged in said Paragraph numbered "XV" of said amended complaint respondent was at any time required by any of said contracts, or by Article 501 of said Regulations, to make available to any representative of the Secretary of Labor for inspection and transcription any of its records of hours and wages of any persons employed by it in said Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery or Paracord Factory; and further denies that, as alleged in Paragraph numbered "XV" of said amended complaint, respondent was at any time required by any of said contracts, or by said Act or by Articles 1 and 103 of said Regulations to pay any persons employed by it in said Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery or Paracord Factory an overtime rate of one and one-half times the basic hourly rate of pay received by said persons, even though certain of said persons were required or permitted by respondent to work in excess of eight hours per day and in excess of forty hours per week.

Seventeenth. As a first and separate defense to the alleged breaches and violations set forth in Paragraphs numbered "XI,"

"XII," "XIII," "XIV," and "XV" of said amended complaint, with respect to its Calfskin Tannery, its Upper Leather Tannery, its Sole Leather Tannery and its Paracord Factory, respondent alleges:

1. Repeats and reiterates all of the allegations set forth in subparagraphs 1, 2, and 3 of Paragraph "Eleventh" of this answer.

2. Repeats and reiterates all of the allegations set forth in Paragraphs "Twelfth," "Thirteenth," "Fourteenth," "Fifteenth," and "Sixteenth" of this answer.

3. That as a manufacturer of leather in its tanneries (Calfskin, Upper Leather and Sole Leather) at Endicott and as a manufacturer of rubber or rubber soles and/or heels in its rubber mills (Paracord Factory) at Johnson City, respondent was not at any time during the performance of any of the contracts for the manufacture of leather shoes, leather boots, gymnasium shoes and arctic overshoes enumerated in Paragraph numbered "II." of the amended complaint, a manufacturer as defined in Regulations 504, Article 101, (a) because in the operation of said tanneries and rubber mills (Paracord Factory) it was not engaged in producing on the premises articles of the general character described by the specifications in said footwear contracts; (b) because the legislative history of the Act of June 30, 1936 (49 Stat. 2036), indicates that the Congress intended the provisions of the Act to apply only to the actual manufacture of articles of the general character described in the specifications contained in said contracts (shoes, gymnasium shoes and arctic overshoes) and not to the tanning of leather or the manufacture of rubber or rubber soles and/or heels.

4. That neither under the Act of June 30, 1936 (49 Stat. 2036) nor under the stipulations contained in any of the contracts for the manufacture of footwear enumerated in Paragraph numbered "II." of the amended complaint, was or is respondent as a manufacturer of leather and as a manufacturer of rubber or rubber soles and/or heels, under any obligation to maintain, keep on file, or make available for inspection records of employment or pay roll records of its said tanneries at Endicott or its rubber mills (Paracord Factory) at Johnson City; and that the Division of Public Contracts of the United States Department of Labor and the Secretary of Labor were and are without jurisdiction or authority to require respondent to maintain, keep on file or make available for inspection records of employment or pay roll records of its tanneries at Endicott or its rubber mills (Paracord Factory) at Johnson City either under the Act of June 30, 1936, or under the stipulations contained in any of the contracts for the manufacture of footwear enumerated in Paragraph numbered "II." of the amended complaint or under any Regulation or Rul-

ing of the Secretary of Labor or of the Administrator of the Division of Public Contracts of the Department of Labor.

5. That the Ruling of the Administrator of the Division of Public Contracts of the United States Department of Labor that the operations of respondent as a manufacturer of leather in tanneries at Endicott and as a manufacturer of rubber, rubber soles and/or heels at Johnson City are subject to the provisions of said Act set forth as stipulations in respondent's contracts to manufacture leather shoes, leather boots, gymnasium shoes and arctic overshoes in factories and premises miles distant from the place of manufacture of said leather and rubber, rubber soles, and/or heels is arbitrary, artificial, unreasonable, discriminatory and capricious.

Eighteenth. Denies that, as alleged in Paragraph numbered "XVI" of said amended complaint, any person employed by respondent in its Sole Cutting Departments (outsoles, middle soles and innersoles) at Johnson City and Endicott, its Counter Department at Johnson City, its Carton Department at Johnson City, or in any other department or factory (except in its George F. Tabernacle Factory, Scout Factory, Jigger Factory and Sunrise Factory), was at any time engaged in the performance of the contracts described and enumerated in Paragraph numbered "II" of said amended complaint; and further denies that, as alleged in said Paragraph numbered "XVI" of said amended complaint, respondent was at any time required by any of said contracts, or by Article 501 of said Regulations, to make available to any representatives of the Secretary of Labor for inspection and transcription any of its records of hours and wages of any person employed by it in said Sole Cutting Departments, Counter Department, Carton Department, or in any other department or factory (except in its George F. Tabernacle Factory, Scout Factory, Jigger Factory and Sunrise Factory); and further denies that, as alleged in said Paragraph numbered "XVI" of said amended complaint, respondent was at any time required by any of said contracts, or by said Act, or by Articles 1 and 103 of said Regulations to pay any persons employed by it in said Sole Cutting Departments, Counter Department, Carton Department, or in any other department or factory (except in its George F. Tabernacle Factory, Scout Factory, Jigger Factory and Sunrise Factory) an overtime rate of one and one-half times the basic hourly rate of pay received by said persons, even though certain of said persons were required or permitted by respondent to work in excess of eight hours per day and in excess of forty hours per week; and further denies that, as alleged in said Paragraph numbered "XVI" of said amended complaint, respondent was at any time required by said contracts Nos. 43 W-155-QM-8232, W-155-QM-CIV 96 and W-155-QM-

CIV-125, or by said Act, or by Article I of said Regulations to pay any persons employed by it in said Sole Cutting Departments, Counter Department, Carton Department, or in any other department or factory (except in its George F. Tabernacle Factory) minimum wages of not less than forty cents per hour or sixteen dollars per week, even though certain of said persons were paid less than said amounts.

Nineteenth. As a first and separate defense to the alleged breaches and violations set forth in Paragraph numbered "XVI" of said amended complaint, with respect to its Sole Cutting Departments, Counter Department and Carton Departments, respondent alleges:

1. That none of the welting used in the manufacture of the leather shoes or leather boots furnished by respondent under any of the contracts set forth and described in Paragraph numbered "II" of said amended complaint was manufactured by respondent; that respondent has no welting department and that all welting used in the performance of said contracts was purchased by respondent from outside suppliers.

2. That none of the leather shoes or leather boots furnished by respondent under any of the contracts set forth and described in Paragraph numbered "II" of said amended complaint contained linings of any kind, except the leather boots furnished under Contract No. W-155-QM-ECW-153 which contained leather linings which were cut and made in its Scout Factory at Johnson City wherein said boots were manufactured; that respondent's Lining Departments at Johnson City and Endicott manufacture and cut only cloth linings.

3. Repeats and reiterates all of the allegations set forth in subparagraphs 1, 2, and 3 of Paragraph "Eleventh" of this answer.

4. Repeats and reiterates all of the allegations set forth in Paragraph "Eighteenth" of this answer.

5. That as a manufacturer of cut leather soles including outsoles, middle soles and innersoles at Johnson City and Endicott; as a manufacturer of counters at Johnson City and as a manufacturer of cartons at Johnson City and Endicott, respondent was not at any time during the performance of any of the contracts for

44 the manufacture of leather shoes, leather boots, gymnasium shoes and arctic overshoes enumerated in Paragraph numbered "II" of said amended complaint, a manufacturer as defined in Regulations 504, Article 101, (a) because in the operation of said Sole Cutting Departments, Counter Department and Carton Departments it was not engaged in producing on the premises articles of the general character described by the specifications in said footwear contracts; (b) because the legislative history of the Act of June 30, 1936 (49 Stat. 2036) indicates that the Congress intended

the provisions of the Act to apply only to the actual manufacture of articles of the general character described in the specifications contained in said contracts (shoes, gymnasium shoes and arctic overshoes) and not to the manufacture of cut soles, counters or cartons.

6. That neither under the Act of June 30, 1936 (49 Stat. 2036), nor under the stipulations contained in any of the contracts for the manufacture of footwear enumerated in Paragraph numbered "II" of said amended complaint, was or is respondent as a manufacturer of cut leather soles, including outsoles, middle soles and innersoles, or as a manufacturer of counters, or as a manufacturer of cartons under any obligation to maintain, keep on file, or make available for inspection records of employment or pay roll records of its Sole Cutting Departments, Counter Department or Carton Departments; and that the Division of Public Contracts of the United States Department of Labor and the Secretary of Labor were and are without jurisdiction or authority to require respondent to maintain, keep on file or make available for inspection records of employment or pay roll records for its Sole Cutting Departments, Counter Department or Carton Departments either under the Act of June 30, 1936 or under the stipulations contained in any of the contracts for the manufacture of footwear enumerated in Paragraph numbered "II" of said amended complaint, or under any Regulation or Ruling of the Secretary of Labor or of the Administrator of the Division of Public Contracts of the Department of Labor.

7. That the Ruling of the Administrator of the Division of Public Contracts of the United States Department of Labor that the operations of respondent as a manufacturer of cut leather soles, as a manufacturer of counters and as a manufacturer of cartons are

subject to the provisions of the Act set forth as stipulations
45 in respondent's contracts to manufacture leather shoes, leather boots, gymnasium shoes and arctic overshoes is arbitrary, artificial, unreasonable, discriminatory and capricious.

Tenth. Denies each and every allegation contained in Paragraph numbered "XVII" of said amended complaint.

Wherefore, respondent demands that said amended complaint be dismissed.

Dated November 24, 1939.

ENDICOTT JOHNSON CORPORATION.

By B. L. BABCOCK, *Treasurer*.

HOWARD A. SWARTWOOD,

WILLIAM H. PRITCHARD,

Attorneys for respondent.

Office and Post Office Address, Sales Building, Endicott, N. Y.

46

Stipulation as to Denials in Answer

District Court of the United States for the Northern District of
New York

[Same title.]

STIPULATION AS TO CERTAIN DENIALS IN DEFENDANTS' ANSWER

It is stipulated that:

1. The denial contained in paragraph Fifth of the defendant's answer, wherein defendants deny the allegations contained in Paragraph numbered "5" of the complaint and application "that all persons employed by the defendant (Endicott Johnson Corporation) in performance of said contracts be paid not less than said minimum wage, without subsequent deduction or rebate on any account" shall be construed as denying that employees covered by the cards, books, statements and records of Endicott Johnson Corporation's Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery, Paracord Factory, Sole Cutting Department (Endicott), Sole Cutting Department (Johnson City), Counter Department (Johnson City), and Carton Department (Johnson City), production of which is sought to be compelled herein, were employed by Endicott Johnson Corporation in the performance of Contracts W-155-QM-8232, W-155-QM-CIV-96, and W-155-QM-CIV-125, for the manufacture or supply of men's welt shoes.

2. The denial contained in paragraph Thirteenth of the defendants' answer, wherein defendants deny the allegations contained in paragraph numbered "13" of the complaint and application that "all the cards, books, statements, and records referred to in paragraph 12 above (of said complaint and application) are . . . relevant, material, and necessary to determine

whether or not the employees covered thereby were, during the periods specified, permitted or required by defendant Endicott Johnson Corporation to work in excess of eight hours

47 per day or in excess of forty hours per week, and whether or not the said defendant failed or refused to pay to said persons for such excess hours the overtime rate of one and one-half times the basic rate of pay received by said persons, and whether or not said defendant failed or refused to pay to such persons minimum wages of not less than forty cents per hour or sixteen dollars per week of forty hours" shall be construed as denying that the employees covered by the cards, books, statements and records of Endicott Johnson Corporation's Calfskin Tannery; Upper Leather Tannery, Sole Leather Tannery, Paracord Factory, Sole Cutting Department (Endicott), Sole Cutting Depart-

ment (Johnson City), Counter Department (Johnson City), and Carton Department (Johnson City), production of which is sought to be compelled herein, were employed by Endicott Johnson Corporation in the performance of any of the contracts for the manufacture or supply of shoes, leather boots, gymnasium shoes and/or arctic overshoes, enumerated in Paragraph numbered "4" of the complaint and application; and as also denying that such cards, books, statements and records are relevant, material and/or necessary to determine any question or matter with respect to the performance by Endicott Johnson Corporation of any of the contracts for the manufacture or supply of shoes, leather boots, gymnasium shoes and/or arctic overshoes, enumerated in Paragraph numbered "4" of the complaint and application.

(Sgd.) HOWARD A. SWARTWOOD,

(Sgd.) WILLIAM H. PRITCHARD,

Attorneys for Defendants,

Endicott Johnson Corporation and Howard A. Swartwood.

48 *Plaintiff's Motion for Judgment on the Pleadings Etc.*

District Court of the United States for the Northern District of
New York

[Same title.]

The pleadings herein having been closed, plaintiff moves the Court for a judgment on the pleadings in favor of plaintiff herein upon the ground that on the undisputed facts appearing from the pleadings, plaintiff is entitled to judgment as a matter of law. Plaintiff further moves that this motion be heard and determined before trial.

In the alternative, plaintiff moves upon the pleadings herein and upon the affidavit of Gerard D. Reilly, sworn to June 6, 1940, annexed hereto, and upon all the records, files, and proceedings in this cause, for summary judgment in favor of plaintiff on the ground that there is no genuine issue as to any material fact and plaintiff is entitled to such judgment as a matter of law.

In the further alternative, plaintiff moves the Court that an order issue to defendants requiring them to appear before plaintiff or a representative designated by plaintiff to produce as and when so ordered the cards, books, statements, and records referred to in paragraph 12 of the complaint and application herein, and to give testimony relating thereto.

RALPH L. EMMONS,

United States Attorney

for the Northern District of New York.

NOTICE OF MOTIONS

TO: HOWARD A. SWARTWOOD, WILLIAM H. PRITCHARD.
Attorneys for Defendants
Sales Building, Endicott, New York.

Please take notice, that the undersigned will bring the above motions on for hearing before this Court at the United
49 States Court Room, Federal Building, Utica, New York, on the day of Monday, June 24, 1940, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

RALPH L. EMMONS,
United States Attorney
for the Northern District of New York
Attorney for plaintiff

BINGHAMTON, NEW YORK, JUNE 17TH, 1940

50 *Affidavit of Gerard D. Reilly in Support*

District Court of the United States for the Northern District
of New York

* [Same title.]

DISTRICT OF COLUMBIA, ss:

Gerard D. Reilly, being first duly sworn according to law on oath, deposes and says:

That he is the Solicitor of the United States Department of Labor and makes this affidavit in connection with the above-entitled civil action and more particularly in regard to (1) the allegation contained in paragraph 9 of the complaint and application filed herein, that plaintiff herein has reason to believe that the persons employed by the defendant corporation in the tanneries, factories and departments specified in said paragraph 9, during the periods set forth in paragraphs 7 and 8 thereof, were employed by it in the performance of the contracts specified in said paragraphs 7 and 8, and (2) the allegation contained in paragraph 9 of said complaint and application, that the hearing,
51 commenced on December 13, 1939, is a hearing on all matters in issue, including not only the issue as to whether the persons employed by the defendant corporation in its tanneries, factories, and departments specified in said paragraph 9, during the periods set forth in said paragraphs 7 and 8, were employed in the performance of the contracts specified in said paragraphs 7 and 8, but also the issue whether, if they were so employed, the representations and stipulations of said contracts and the Act of June 30, 1936, and the Regulations of the Secre-

tary of Labor were breached by the defendant corporation, and if so, to what extent.

That Sections 1 (b) and 1 (c) of the Act of June 30, 1936, 49 Stat. 2036, the Act under which this action is brought, cover persons employed by the contractor "in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract."

That the U. S. Army Specification No. 9-6E, made a part of the nine contracts for leather shoes specified in Paragraph 4 of the complaint and application, provides in part as follows:

"II. TYPES

"1. This specification covers the manufacture of but one type shoe, a russet cowhide, side leather, blucher, service shoe with slip top, half bellows tongue, full toe vamp (without box) solid leather heel, and no lining.

"*Note.—The word 'manufacture' as herein construed shall mean the performance of all operations and processes necessary for the completed shoe, but shall not be construed to prohibit a contractor from purchasing outer soles, inner soles, top lifts, heel lifts, 52 or counters in the form of cut stock, nor from purchasing welting and counters already prepared for use.*" [Italics supplied.]

That defendants have at all times admitted that the tanneries of the defendant corporation manufactured and produced the leather used in the performance of the twelve contracts for leather boots and shoes listed in paragraph 4 of the complaint and application filed herein; that its paracord factory manufactured and produced the rubber and rubber heels and soles used in the performance of the said contracts; and that its sole cutting departments at Endicott and Johnson City, its counter department at Johnson City, and its carton department at Johnson City, were also engaged respectively in the cutting of soles and manufacture of counters and cartons used in the performance of the said contracts.

That the answer filed herein by the defendants and the answer filed by the defendant corporation to the amended complaint issued against it at the direction of the Secretary of Labor more specifically admit the participation of defendant corporation's tanneries, paracord factory, and sole cutting, counter, and carton departments in the performance of the aforesaid contracts and that like admissions of the participation of the tanneries, factories and departments mentioned were made by the defendant Swartwood at the commencement of the hearing on December 13, 1939, before the Trial Examiner designated by the Secretary of Labor.

That at a hearing before the National Labor Relations Board on October 23, 1939, the defendant Swartwood described
53 all of the plants, factories and departments operated by the defendant corporation as being located within a circle having a radius of nine miles and as being controlled by one central office at Endicott, New York, with all employees being paid through the pay roll office at Endicott.

That at the said hearing before the National Labor Relations Board, the defendant Swartwood was asked by counsel for the defendant corporation the following questions and gave the following answers:

"Q. Switching to another subject, particularly that of the functional intergration of the various plants, properties of this corporation, is it your judgment that this business carried on in Binghamton, Johnson City, Endicott, and Owego as one integrated business?"

"A. Yes, sir, it is an industrial, as far as my judgment can determine.

"Q. Will you state for us whether the various plants located in these four different territories are all interdependent, interrelated in connection with their manufacturing operations?"

"A. Yes, sir. The factories in the cities of Binghamton, Johnson City, Endicott and Owego are all dependent upon the tanneries at Endicott for the leather which go into the shoes which are made in those four communities. The factories in all four of those communities are dependent upon the rubber department at Johnson City for the rubber soles and heels which are used in the production of shoes in all four towns, or in the factories in all four towns."

54 That a letter dated November 14, 1939, a copy of which is attached hereto as Exhibit A, was sent to the defendant corporation by registered mail; that a letter dated December 2, 1939, a copy of which is attached hereto as Exhibit B, was sent to the defendant Swartwood by registered mail; that the said two letters were the only communications to either of the defendants from the time of the issuance of the amended complaint until the commencement of the hearing on December 13, 1939; and that the said two letters show that the hearing, commenced on December 13, 1939, is a hearing on all matters raised by the amended complaint, including not only the issue as to whether the persons employed by the defendant corporation in its tanneries, factories, and departments specified in paragraph 9 of the complaint and application herein, during the periods set

forth in paragraphs 7 and 8 thereof, were employed in the performance of the contracts specified in said paragraphs 7 and 8, but also the issue whether, if they were so employed, the representations and stipulations of said contracts and the Act of June 30, 1936, and the Regulations of the Secretary of Labor were breached by the defendant corporation, and if so, to what extent.

That no limitation of the issues to be heard at the hearing, commenced on December 13, 1939, has at any time been effected.

GERARD D. REILLY.

Subscribed and sworn to before me this 6th day of June 1940.

S. J. GOMPERS

Notary Public in and for the District of Columbia.

My commission expires: February 14, 1945.

55 *Exhibit A Annexed to Affidavit of Gerard D. Reilly*

NOVEMBER 14, 1939.

Via Registered Mail.

Return Receipt Requested.

Re: Amended Complaint and Hearing Under Fifteen Government Contracts

ENDICOTT JOHNSON CORPORATION,

Endicott, New York.

GENTLEMEN: Reference is made to my letter of October 4 with which was enclosed copy of a complaint charging you with breach of contract, violations of Sections 1, 4 and 6 of the Act of June 30, 1936 (49 Stat. 2036), and violations of certain Regulations of the Secretary of Labor thereunder in connection with fifteen Government contracts. Enclosed herewith is a copy of an amended complaint which has this day been issued and filed against you and which is to be substituted for the complaint which was issued on October 4, 1939.

An answer to the amended complaint may be filed with the Administrator of the Division of Public Contracts within ten days after receipt of this letter and amended Complaint by you. The answer must contain a short and simple statement of the facts which constitute the grounds of defense; it must specifically admit or deny or explain each of the facts alleged in the complaint, unless you are without knowledge, in which case the answer must so state, and such statement shall operate as a denial. Any allega-

tion in the complaint ~~not~~ specifically denied in the answer, unless you shall state in the answer that you are without knowledge, shall be deemed to be admitted to be true, and may be so found by the Administrator.

A hearing on this complaint will be held before an Examiner of this Department at Binghamton, New York, on or about December 15, 1939. You will be advised later of the exact time and place of the hearing. You are at liberty to appear at this hearing in person, or by your duly appointed attorney, or representative, and to present evidence and arguments; and to submit, at or before such hearing, such written statements and documents as you may see fit.

Please address all communications in this matter to Mr. L. Metcalfe Walling, Administrator, Division of Public Contracts, Department of Labor, Washington, D. C.

C. V. McLAUGHLIN,
Assistant Secretary of Labor.

Encl. (1).

56 *Exhibit B Annexed to Affidavit of Gerard D. Reilly*

DECEMBER 2, 1939.

Via Registered Mail.
Return Receipt Requested.

Mr. HOWARD A. SWARTWOOD,
Secretary, Endicott Johnson Corporation, Endicott, New York.

DEAR MR. SWARTWOOD: This will acknowledge receipt of your letter of November 24, 1939, transmitting the original and two carbons of the answer of the Endicott Johnson Corporation to the amended complaint and the original and two carbons of the notice of motion supported by your affidavit.

In accordance with the advice given by Mr. McLaughlin, Assistant Secretary of Labor, in his letter of November 14, 1939, the hearing will commence at 10:00 a. m. on Wednesday, December 13, 1939, in the Federal Court Room or such other room as may be available on that date in the Post Office Building, Binghamton, New York.

Very truly yours,

L. METCALFE WALLING,
Administrator.

District Court of the United States for the Northern District of
New York

[Same title.]

STATE OF NEW YORK,

County of Broome, ss.

Howard A. Swartwood, being duly sworn, deposes and says:

I reside in the City of Binghamton, New York. I am one of the defendants named in the above-entitled action, and am also the Secretary and General Counsel of Endicott Johnson Corporation, the other defendant named in said action.

The controversy out of which the action, now pending before the United States District Court for the Northern District of New York, arose, was commenced by the service upon the defendant (then respondent) Endicott Johnson Corporation, of a complaint signed by the Assistant Secretary of Labor and entitled, "United States of America, Division of Public Contracts, Department of Labor, Number 208, In the Matter of Endicott Johnson Corporation." This complaint was served on October 6, 1939 and charged the defendant, Endicott Johnson Corporation, with breach of certain representations and stipulations of fifteen contracts with the United States Government, and with violation of certain provisions of the Act of June 30, 1936, entitled "An act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," 49 Stat. 2036; U. S. C., Title 41, secs. 35-45.

On October 16, 1939, the defendant (then respondent) Endicott Johnson Corporation, addressed a motion to the Examiner of the Division of Public Contracts, Department of Labor, to
58 require complainant (1) to separately state and number the alleged violations of the Act stated in the complaint, (2) to make said complaint more definite and certain in certain particulars and (3) for an extension of defendants' time to answer pending determination of the motion. This motion was based upon an affidavit made by me, verified October 16, 1939, which affidavit and notice of motion is hereby referred to, incorporated herein, and made a part hereof.

On November 16, 1939, an amended complaint signed by the Assistant Secretary of Labor entitled "United States of America, Division of Public Contracts, Department of Labor, Number 208, In the Matter of Endicott Johnson Corporation," complying in some respects with the motion of the defendant (then respondent) Endicott Johnson Corporation, was served upon said Corporation. Within ten days thereafter the then respondent Endi-

cott Johnson Corporation served and filed its answer to such amended complaint and at the same time addressed a notice of motion to the Examiner of the Division of Public Contracts, Department of Labor, that at the opening of the hearing called upon said amended complaint, Endicott Johnson Corporation would move for an Order requiring complainant to state certain dates and particulars with respect to said amended complaint. This motion was based upon an affidavit made by me, verified November 24, 1939, which affidavit and notice of motion is hereby referred to, incorporated herein and made a part hereof.

On December 7, 1939, subpoenas duces tecum were served upon me as Secretary of said Endicott Johnson Corporation, and upon said Corporation requiring each of us to produce at the hearing of December 13, 1939, certain time cards, time books, employees' wage statements and pay roll records, showing the hours worked each day by and the wages paid each week to persons employed by Endicott Johnson Corporation in various factories and departments, and for certain periods specified in such subpoenas.

The subpoenas duces tecum above mentioned required the production of three separate and distinct classes or groups of pay roll records, (1) records of footwear factories in which Endicott Johnson Corporation manufactured and furnished to the United States Government men's leather welt shoes and boots, gymnasium shoes, and arctic overshoes, (2) records of tanneries producing upper leather and sole leather, and records of rubber mill producing rubber, rubber soles and heels, and (3) records of sole cutting, counter, and carton departments.

At the hearing on December 13, 1939, I personally and in behalf of Endicott Johnson Corporation refused to produce any records relating to the tanneries and rubber mills of Endicott Johnson Corporation, and also refused to produce any records relating to the sole cutting, counter, and carton departments of said Endicott Johnson Corporation. The reasons and grounds for such refusal are specifically and at length set forth in the testimony given by me before William A. McIlwaine, Examiner, at the hearing held on December 13, 1939, at pages 22 to 30 inclusive, of the official minutes taken at such hearing, which official minutes are hereby referred to, incorporated herein and made a part hereof. The reasons for such refusal are also specifically and at length set forth in paragraphs Fourteenth, Fifteenth, Sixteenth and Seventeenth of defendants' answer herein.

Under Regulation 504, Article 101, promulgated by the Division of Public Contracts, Department of Labor, the term manufacturer is defined as follows:

"A manufacturer is a person who owns, operates, or maintains a factory or establishment that produces on the premises the mate-

rials, supplies, articles, or equipment required under the contract and of the general character described by the specifications."

The general character of the articles required under the fifteen contracts herein referred to is (a) men's leather welt shoes and boots, (b) gymnasium shoes and (c) arctic overshoes.

In submitting bids for each of the fifteen contracts herein mentioned, Endicott Johnson Corporation was required to specify the premises or place of manufacture under the following paragraph contained in such bids:

60 "Names and Locations of Factories: Bidders must state in space provided below *names and locations of the factories where manufacture of the item bid upon will be performed.* The performance of any of the work contracted for in any place other than that named in the bid is prohibited, unless the same is specifically approved in advance by the contracting officer. If more than one place of manufacture is named, the quantity to be manufactured in each place must be given:

"Names and Locations of Factories—Quantities"

The premises or place of manufacture of men's leather welt shoes and boots was specified in each of said bids as George F. Tabernacle Factory, Binghamton, N. Y., and/or Scout Factory, Johnson City, N. Y.; of gymnasium shoes as Jigger Factory, Johnson City, N. Y.; and of arctic overshoes as Sunrise Factory, Johnson City, N. Y.

The Secretary of Labor in her order of December 21, 1937, establishing a minimum wage in the Men's Welt Shoe Industry, recognized the fact that the manufacture or supply of men's welt shoes was separate and distinct from the tanning of leather and the manufacture of rubber heels and soles, by using the following language:

"That the minimum wage for employees engaged in the performance of contracts with agencies of the United States Government subject to the provisions of Public Act No. 846, 74th Congress, approved June 30, 1936, 49 Stat. 2036, *for the manufacture or supply of men's welt shoes* shall be 40 cents per hour or \$16 per week for a week of 40 hours, to be arrived at either upon a time or piece-work basis."

In the recent Wage Order by which the Administrator of the Wage and Hour Division of the United States Department of Labor promulgated the 35 cents per hour wage rate effective April 29, 1940, in the Shoe Manufacturing and Allied Industries, such industries are defined as follows:

"SECTION 554.4. Definition of Shoe Manufacturing and Allied Industries—

"The Shoe Manufacturing and Allied Industries, to which this Order shall apply, are hereby defined as follows:

"(a) The manufacture of partial manufacture of footwear from any material and by any process except knitting, vulcanizing of the entire article or vulcanizing (as distinct from cementing) of the sole to the upper.

"(b) The manufacture or partial manufacture of the following types of footwear, subject to the limitations of paragraph (a) but without prejudice to the generality of that paragraph:

61 "Athletic shoes
Boots
Boot tops
Burial shoes
Custom-made boots
or shoes

Moccasins
Puttees, except
spiral puttees
Sandals
Shoes completely rebuilt
in a shoe factory
Slippers

"(c) The manufacture from leather or from any shoe-upper material of all cut stock and findings for footwear, including bows, ornaments, and trimmings.

"(d) The manufacture of the following types of cut stock and findings for footwear from any material except from rubber or composition of rubber, molded to shape:

"Outsoles
Midsoles
Insoles
Taps
Lifts

Rands
Toplifts
Bases
Shanks
Boxtoes

Counters
Stays
Strippings
Sock Linings
Heel pads

"(e) The manufacture of heels of any material except molded rubber, but not including the manufacture of wood-heel blocks.

"(f) The manufacture of our upper parts of footwear, including linings, vamps, and quarters.

"(g) The manufacture of pasted shoe stock.

"(h) The manufacture of boot and shoe patterns."

The sole leather and upper leather tanneries of Endicott Johnson Corporation are not a part of the Boot and Shoe Industry but are part of the Tanning and Leather Industry.

The Tanning and Leather Industry is recognized as a separate and distinct industry by the Bureau of Census, Department of Commerce, which has defined such industry as follows:

"CENSUS OF MANUFACTURERS, 1935

"Industry 907.—Leather; Tanned, curried, and finished.

"Tanneries manufacturing leather, whether from hides and skins owned by them or on a contract basis from hides and skins owned

by others; and establishments engaged in currying and finishing leather.

(Industry Classification for the Census of Manufacturers, 1935.)"

"CENSUS OF MANUFACTURERS, 1937

"Industry 907.—Leather; Tanned, curried, and finished, Regular factories.

"Tanneries manufacturing leather from hides and skins owned by them; and establishments engaged in currying and finishing leather.

"Industry 927.—Leather; Tanned, curried, and finished, Contract factories.

"Tanneries manufacturing leather on a contract basis from hides and skins owned by others; and establishments engaged in currying and finishing leather owned by others."

(Industry Classification for the Census of Manufacturers, 1937.)

62 Under the National Industrial Recovery Act there were separate and distinct codes for the Boot and Shoe Manufacturing Industry, the Leather Industry and the Rubber Manufacturing Industry.

(a) Code of Fair Competition for the Boot and Shoe Manufacturing Industry

Article I—Purposes

"SECTION 1.—To cooperate with the President of the United States in effectuating the policy of Title I of the National Industrial Recovery Act the following provisions are established as a Code of Fair Competition for the Boot and Shoe Manufacturing Industry, comprising the manufacture of boots, shoes, sandals, slippers, moccasins, leggings, over-gaiters, and allied footwear chiefly of leather, and also footwear of canvas and other textile fabrics, together with such other products of the Boot and Shoe Industry as may from time to time be included in this Code."

(b) Code of Fair Competition for the Leather Industry:

Article II—Definitions (as amended)

"The term 'leather industry' shall be held to comprise all persons engaged in tanning or finishing leather, for further fabrication or for sale, for their own account or for the account of others, or performing any operation subsidiary thereto, or having leather tanned or finished in American factories, or engaged in the sale of American tanned or finished leather for their own account or for the account of others, and persons, approved by the National Recovery Administration, engaged in the cutting or further par-

tial fabrication of leather. The 'leather industry' is hereby classified into the following divisions:

"Bag Case and Strap.—Tanners of leather made from cattle hides of various types for the manufacture of traveling bags, luggage, and strap leather for various purposes.

"Calf and Kip.—Tanners of leather made from calfskin and cattle hides largely for the manufacture of shoes.

"Fancy.—Tanners of leather made from various types of hides and skins of animals, including reptilian leathers, suitable for fancy articles such as pocketbooks, suitcases, handbags, etc.

"Goat and Cabretta.—Tanners of leather from goatskins and cabretta skins, mainly suitable for shoe purposes.

"Harness and Collar.—Tanners of leather from cattle hides suitable for horse equipment.

"Sheep and Glove.—Tanners of sheepskins suitable largely for garments, gloves and shoe linings; also hat and capsweat leathers as produced by the National Hat and Capsweat Leather Association.

"Sole and Belting.—Tanners of leather made from cattle hides for the manufacture of shoes and industrial belting.

"Upper, East, West.—Tanners of leather, including japanners (finishers), largely made from cattle hides and kips (small cattle hides) suitable for the manufacture of shoes.

"Upholstery.—Tanners of cattle-hide leather suitable for use in the manufacture of furniture, automobiles, etc.

"Leather Belting Division.—Manufacturers of industrial belting, lace leather and leather laces, miscellaneous straps, packings (hydraulic and otherwise) and mechanical leathers (wholly or principally of leather) for use on industrial machinery, excluding such leathers that a machinery manufacturer may produce for use on equipment of his own manufacture.

63 "Cut soles.—Tanners and/or cutters and producers of leather soles used in the manufacture of shoes.

"Welting.—Tanners and manufacturers of welting leather and/or leather welting used in the manufacture of shoes.

"Grain Insoles, Counters, Fox Toes and Heels. Tanners and/or manufacturers of leather used in these products and/or manufacturers of these products themselves used in the manufacture of shoes."

(c) Code of Fair Competition for the Rubber Manufacturing Industry:

Article I—Definitions

"SECTION 1. The term 'Rubber Manufacturing Industry' or 'Industry' as used herein means the manufacture for sale in the continental United States (including Alaska) of any rubber product or products, expressly excluding, however, all solid and

pneumatic tires and pneumatic tubes, and tire accessories and/or tire-repair materials, together with such other rubber products as may be specifically covered by another duly approved Code of Fair Competition.

"Sec. 2. The term 'Division of the Industry,' as used herein, includes the several branches of the Industry which have been or may hereafter be established, as herein below provided, as administrative units, under the provisions of this Code. The Divisions immediately established and defined in Chapters II to X are:

"Automobile Fabrics, Proofing, and Backing Division; Rubber Flooring Division; *Rubber Footwear Division*; Hard Rubber Division; *Heel and Sole Division*; Mechanical Rubber Goods Division; Sponge Rubber Division; Rubber Sundries Division; Rainwear Division."

Chapter IV—Rubber Footwear Division

Article I

SECTION 1. "The Rubber Footwear Division shall consist of all members of the Industry engaged in the manufacture for sale or wholesale sale by manufacturers, or any subsidiary or affiliate of the same, of all types of so-called 'Waterproof and Canvas Rubber-Soled Footwear'."

Chapter VI—Heel and Sole Division

Article I

SECTION 1. "The Heel and Sole Division shall consist of all members of the Industry engaged in the manufacture for sale of rubber heels, soles, soling sheets, strips, taps, sport soles, sport heels, stick-on soles and heels, and rubber heel and sole cement."

The Administrator of the Wage and Hour Division of the Department of Labor is also considering and treating the Leather Industry as an industry separate and distinct from the Shoe Manufacturing and Allied Industries, has appointed an industry committee for such Leather Industry, and on June 3, 1940, held hearings on the recommendation of such industry committee that a 40-cent per hour minimum wage be established for such Leather Industry.

64 With respect to defendants' contention and defense that the ruling of the Administrator of the Division of Public Contracts of the United States Department of Labor, that the operations of the defendant, Endicott Johnson Corporation, as a manufacturer of leather in its tanneries at Endicott, N. Y., and

as a manufacturer of rubber, rubber soles, and/or heels at Johnson City, N. Y., are subject to the provisions of the Act set forth as stipulations in contracts to manufacture leather shoes, leather boots, gymnasium shoes, and arctic overshoes in factories and premises miles distant from the place of manufacture of such leather and rubber, rubber soles and/or heels, is arbitrary, artificial, unreasonable, discriminatory and capricious, I wish to point out the following facts:

During the period when Endicott Johnson Corporation was manufacturing shoes for the United States Government, only .162% of the upper leather produced in its upper leather tanneries was used in the performance of Government contracts. Only .042% of the upper leather produced in its calf-skin tanneries was used in the performance of the Government contracts. Only .049% of the sole leather produced in its sole leather tanneries was used in the performance of Government contracts, and only .034% of the rubber soles and heels produced in its rubber plants were used in the performance of Government contracts. In other words, from 84% to 97% of the production in its tanneries and rubber plants was for commercial purposes. It is impossible to separate the employees who produce leather, rubber heels and soles to be used in Government shoes from those who produce the leather, rubber heels and soles to be used for commercial purposes, (1) because the leather which is used for leather soles on Government shoes is not selected until the cut soles have been sorted and graded as to defects and sizes, (2) because the hides which are to be used in upper leather in Government shoes are not selected until approximately two-thirds of the tanning process has been completed, i. e., they have progressed to the stage of the fat liquor, and (3) because the rubber heels and soles for the Government shoes are not selected until they have been sorted and graded as to defects and sizes. The ruling made by the Division of Public Contracts would require Endicott Johnson Corporation

to pay time and one-half for overtime to an employee who
65 works any portion of a day or week on a Government contract and the remainder on commercial work even though all the actual overtime is devoted to commercial work. In view of the fact that it is impossible to separate these employees or the operations, the Corporation contends that the ruling of the Division of Public Contracts is arbitrary, unreasonable, unfair, and discriminatory because it would require it to manufacture from 84% to 97% of its leathers, rubber soles and heels under the provisions of the Walsh-Healey Act simply because 3% to 16% of its production of such leather, rubber soles and heels was to be used in Government shoes.

The Corporation also contends that the ruling is unfair to it because one of its competitors bidding on Government shoes who did not own and operate tanneries and rubber mills could purchase his leather and rubber heels and soles from another manufacturer and the manufacturer from whom they were purchased would not be required to comply with the provisions of the Walsh-Healey Act. This it believes will seriously impair the conduct of the Government business.

In support of the contention of Endicott Johnson Corporation that its operations in its tanneries, rubber mill and auxiliary departments were not and are not subject to the provisions of the Act, I wish to state that Endicott Johnson Corporation is a subscriber to Prentice-Hall Labor Service, and that during the performance of said contracts and on/or about December 30, 1936, the following paragraph appeared in such Prentice-Hall Labor Service with respect to the application of the Act:

(13,075.2) "Application of Act Only to Plant or Plants Engaged on Contract.—Inasmuch as Congress limited the scope of the Act to the manufacture of the articles required under the Government contract, a manufacturer of automobiles and farm implements having a Government contract for the supplying of trucks in an amount in excess of \$10,000, would be complying with the Act on truck contracts if the truck factories were operated in conformity with the law. Circular Letter No. 200 of Jan. 5, 1937, of the Procurement Div. of Treas., quoting letter of Act'g Admin., Public Contracts Act of Dec. 30, 1936, to Vice Pres. and Gen. Counsel, International Harvester Co., Inc."

The above quoted paragraph from the Prentice-Hall Labor Service refers to Circular Letter No. 200 of January 5, 1937, of the Procurement Division of the Treasury Department, quoting letter of the Acting Administrator of the Public Contracts Act dated December 30, 1936.

Gerard D. Reilly, who makes the affidavit in connection with the present motion herein, was then the Acting Administrator of the Public Contracts Act and the full context of such circular letter No. 200 is as follows:

"TREASURY DEPARTMENT,
PROCUREMENT DIVISION, BRANCH OF SUPPLY,
January 5, 1937.

Circular Letter No. 200.

To the Heads of all Departments and Establishments:

Subject: Ruling with respect to the application of the Walsh-Healey Public Contracts Act (Public No. 846, 74th Congress) to certain phases of the Automotive Industry.

Following is copy of letter received from the Acting Administrator of the Public Contracts Act:

DECEMBER 30, 1936

Mr. WILLIAM S. ELLIOTT

Vice President and General Counsel

International Harvester Company, Inc.

606 South Michigan Avenue, Chicago, Illinois

DEAR MR. ELLIOTT: "Pursuant to our conference yesterday and your subsequent letter the Department has considered a number of questions raised by the International Harvester Company with respect to the application of the Walsh-Healey Act (Act of June 30, 1936, Public No. 846, 74th Congress).

"While the Department appreciates that under the codes of fair competition the factories of your company were permitted a tolerance in the forty-hour-week provision so as to permit averaging of time, it does not seem possible under Public Act No. 846 to grant such a device. The act is quite explicit in requiring that in manufacturing operations performed on a government contract falling within the act, no employees be permitted to work more than eight hours in any one day or forty hours in any one week without receiving time and one-half for the hours worked in excess of those limits.

"The questions which you have submitted to me relate specifically to the scope of the act in contracts for motor trucks. I understand that your company operates two motor trucks plants and also separate factories in which farm implements, magnetos for tractors and steel and other materials are manufactured.

"Your first question is whether the company would be complying with the stipulations required by the act if it adapted its operations in the truck factories to these standards, or whether they also apply to the other mills owned and managed by the company. Inasmuch as Congress limited the scope of the act to manufacture of the articles required under the government contract, your company would be complying with the act on truck contracts if the truck factories were operated in conformity with the law.

"Your second question relates to the employment of foremen. It is understood that these foremen are salaried employees and are not manually engaged in productive operation under the contract. In a recent opinion rendered to the Public Contracts Board in connection with textile manufacturing the Solicitor of Labor ruled that foremen in this category do not come within the act. It follows that this ruling is equally applicable in this instance.

"Your third question notes that custodial and maintenance employees are not covered by the act and regulations and you ask for a more precise list of employees falling into this category.

Employees in this class include watchmen, timekeepers, janitors, firemen, repair crews and outside crews.

"Your fourth question asks whether employees in branch warehouses and service stations engaged in maintaining stocks for repairs for trucks and in performing repair services for trucks are covered by the act. It has been a consistent ruling of the Department that where the bidder is a manufacturer the act applies to the manufacturing operations and not to the distribution of the product. It is understood that none of the employees of these branch units are engaged in manufacturing. Consequently these employees do not come within the act.

"The answers given to the foregoing questions, although directed primarily with regard to contracts for motor trucks, are sufficiently broad to apply also to contracts for tractors, or for any other articles, materials, supplies or equipment contracted for in excess of \$10,000.

"I trust that this letter will clarify those features of the act which are of principal concern to your company, and that you will feel free to write again if other questions occur to you.

Sincerely yours,

GERARD D. REILLY,
Acting Administrator,
Public Contracts Act.

Approved:
CHARLES O. GREGORY,
Acting Secretary of Labor.

H. E. COLLINS,
Assistant Director of Procurement."

68 Endicott Johnson Corporation relied upon the ruling made by Acting Administrator Reilly with respect to the International Harvester Company and honestly believed that its operations in its tanneries, rubber mill and auxiliary departments were not covered by the provisions of the Act which were inserted as stipulations in its contracts for the manufacture of leather shoes, leather boots, gymnasium shoes and arctic overshoes. As a matter of fact, no claim was ever made by the Division of Public Contracts of the United States Department of Labor that the operations of Endicott Johnson Corporation in its tanneries, rubber mill, and auxiliary departments were covered by the provisions of the Act until in or about the month of July 1938, at which time the defendant, Endicott Johnson Corporation, had completed all of the fifteen contracts hereinbefore referred to with the exception of the contracts dated May 16, 1938 and June 6, 1938, for the manufacture of leather shoes in its George F. Tabernacle Factory at Binghamton, N. Y., and the contract dated May 31, 1938

for the manufacture of arctic overshoes in its Sunrise Factory at Johnson City, N. Y.

I also wish to point out that no official ruling of the Division of Public Contracts of the United States Department of Labor, with respect to the application of the Act to an integrated establishment, was ever made until September 29, 1939, almost a year after Endicott Johnson Corporation had completed the performance of all of the fifteen contracts hereinbefore enumerated. This ruling with respect to integrated establishments, referring specifically to the processing of leather and rubber for shoes, was included in "Rulings and Interpretations No. 2", (superseding No. 1, issued July 6, 1937) and dated September 29, 1939. Referring now to that portion of the affidavit of Gerard D. Reilly, filed in support of the present motions herein, which quotes my testimony before the National Labor Relations Board as to the integration of the business of Endicott Johnson Corporation, I wish to quote the testimony given by me at the hearing held before William A. McIlwaine, Examiner, on December 13, 1939, and appearing in the official minutes taken at such hearing, page 63, as follows:

"Mr. GRANT: I wanted to ask just a few questions, Mr. Examiner.

By Mr. GRANT:

69 "Q. Mr. Swartwood, at this hearing before the National Labor Relations Board on October 23d, you were asked a question by Mr. John C. Bruton, who was of counsel for the company, a very pertinent question to this proceeding here, in which (I will read you the question) he says: 'Switching to another subject, particularly that of the functional integration of the various plants and properties of this corporation, is it your judgment that this business carried on in Binghamton, Johnson City, Endicott, and Owego is one integrated business?' Your answer was, which is not entirely clear, and it may be that it was the fault of the reporter: 'Yes, it is an industrial, as far as my judgment can determine.'

"A. The word 'unit' is left out. It means industrial unit for collective bargaining.

"Q. In other words you consider it as an integrated business for the purpose of collective bargaining?

"A. Only for the purpose of the Wagner Act and for the purpose of designating an appropriate unit under which an election could be held to determine who the bargaining agent should be for that appropriate unit."

In connection with that portion of the affidavit of Gerard D. Reilly, which quotes United States Army Specifications No. 9-6E with respect to types of shoes, I wish to point out that the underscored note construing the word "manufacture" actually means that

such manufacture is confined solely to the operations necessary to complete the shoe in the shoe manufacturing process and does not relate to the performance of operations in the manufacture of materials used in such shoes. This is apparent from the fact that the note defining "manufacture" permits the contractor to purchase outer-soles, inner-soles, top lifts, heel lifts, and counters in the form of cut stock and welting and counters already prepared for use. If the promulgators of United States Army specifications had considered that the manufacture of upper leather, sole leather, and rubber soles and heels were any part of the shoe manufacturing operation, they would have included the purchase of such leather, rubber soles and heels as materials which might also have been purchased by the contractor.

In this connection I also wish to point out that there are only three shoe manufacturers in the United States who are also manufacturers and tanners of leather, and manufacturers of rubber, rubber soles and heels, and that the persons promulgating the United States Army specifications could not and would not have promulgated specifications which would have included the manufacture of leather, rubber, rubber soles and heels with respect to three shoe manufacturers and have excluded such operations with respect to all other shoe manufacturers.

70 I verily believe that the facts herein set forth show that the defendants herein have raised and have established a genuine and bona fide issue as to whether the operations of Endicott Johnson Corporation in its tanneries, rubber mill, sole cutting department, counter department and carton department are covered by or subject to the provisions of the Act set forth as stipulations in said fifteen contracts to manufacture men's welt shoes and boots, gymnasium shoes and arctic overshoes; that this issue must first be determined in the affirmative by the Court, after evidence produced, before the defendants herein are required to produce any of the records which this proceeding seeks to compel them to produce; that unless and until the Court does determine this issue in the affirmative the plaintiff herein was and is without jurisdiction or authority to require the production of such records, to make any investigations or inquiries with respect thereto, to hold hearing with respect thereto, or to make any findings of fact with respect thereto.

With respect to the statement contained in the affidavit of Gerard D. Reilly that no limitation of the issues to be heard at the hearing on December 13, 1939, has at any time been effected, I wish to call attention to the affidavit hereinbefore referred to made by me, verified November 24, 1939, in connection with motion for bill of particulars as to the amended complaint in the proceeding before the Division of Public Contracts, which affidavit has never been controverted; and also the testimony taken at said hearing of

December 13, 1939, which has already been incorporated herein and made a part hereof, as follows:

Statement of Clifford P. Grant—Pages 31 to 33 inc.

Statement of Howard A. Swartwood—Page 33.

(Sgd.) HOWARD A. SWARTWOOD.

Subscribed and sworn to before me this 15th day of June 1940.

[SEAL]

CLAIRE E. CAREY,
Notary Public.

71

Opinion of February 1, 1941

United States District Court, Northern District of New York

[Same title]

BRYANT, D. J. This is a proceeding to obtain an Order of the Court directing the Endicott Johnson Corporation and its Secretary to obey certain subpoenas duces tecum issued by the Secretary of Labor in an administrative proceeding under the Act of June 30, 1936 (49 Statutes 2035), known as the Walsh-Healey Public Contracts Act. Jurisdiction to issue such an order is provided by Section 5 of the Act.

Plaintiff maintains that the Court has power, in a summary proceeding, to grant the requested order. However, to avoid any question of procedural irregularity, she has followed the Federal Rules of Civil Procedure governing plenary actions. The proceeding was initiated by the filing of a pleading denominated "complaint and application." Issue was joined by the filing of a joint answer which later, by stipulation, was limited relative to construction to be placed upon certain denials contained therein.

Plaintiff now asks for relief in three alternative forms:

- (1) By motion for judgment on the pleadings.
- (2) By motion for summary judgment.
- (3) By motion for an Order directing compliance with the subpoena.

Plaintiff's contention can be fairly summarized by stating that, regardless of whether or not a plenary civil action is required, she is entitled to the relief contemplated by alternative (1) and (2) and that (3) becomes academic. However, should the court hold otherwise on alternatives (1) and (2) then her contention is that

only a summary proceeding is needed to obtain an order to enforce an administrative subpoena and that the Federal Rules of Civil Procedure are not applicable to restrict such a summary proceeding.

Discussion of procedure seems to be unnecessary. The question at issue is whether or not the court, without further showing, will require defendants to obey the departmental subpoena. Decision

72

of the question will affect the parties the same whether the present controversy be considered a plenary action or a summary proceeding. On this point, suffice to say that I do not consider it necessary to follow the Federal Rules controlling plenary actions. Relief can be granted in a summary proceeding. (National Labor Relations Board v. The Goodyear Tire & Rubber Co., decided Nov. 27, 1940, No. Dist. of Ohio.).

Endicott Johnson Corporation is engaged in manufacturing in four cities in New York State, all of which are within a radius of about nine miles. It operates twenty-two footwear factories, six tanneries, and twenty-six independent departments. The shoe factories are located in all four cities; the tanneries are all in Endicott and the rubber mill is in Johnson City. In the fall of 1936, the corporation received fifteen orders from the Government. Twelve of these orders were for the manufacture of men's leather welt shoes; two for the manufacture of gymnasium shoes and one for arctic overshoes. All orders were completed by about October 11, 1938. The corporation received these orders or contracts as a result of bids submitted. In each bid the corporation was required to submit the place or places where the articles would be manufactured. The specifications covering this requirement reads:

73 "NAMES AND LOCATIONS OF FACTORIES.—Bidders must state in space provided below names and locations of the factories where manufacture of the item bid upon will be performed. The performance of any of the work contracted for in any place other than that named in the bid is prohibited, unless the same is specifically approved in advance by the contracting officer. If more than one place of manufacture is named, the quantity to be manufactured in each place must be given:

"NAMES AND LOCATIONS OF FACTORIES QUANTITIES"

In compliance with above requirement the corporation designated the George F. Tabernacle Factory, Binghamton, N. Y., as the place for the manufacture of men's leather welt shoes; the Jigger Factory, Johnson City, N. Y., as the factory for the manufacture of gymnasium shoes, and the Sunrise Factory, Johnson City, N. Y., as the place of manufacture of arctic overshoes. These factories do not make or tan leather, neither do they make rubber soles, out soles or cartons. These articles are produced in tanneries, rubber mills and factories located at distances ranging from two to nine miles from the designated factories. These facts were known to the Labor Department (Public Contracts Division), if not at the time of the making of the contract then

very soon thereafter, because periodical inspections were made. No complaint of noncompliance by the four designated factories with the provisions of the Walsh-Healey Act has been made.

In July, 1938, when thirteen of the fifteen contracts had been completed, a representative of the Department of Labor asked for the records of the tanneries at Endicott and the rubber mill at Johnson City, basing the request upon the ground that these plants had produced the leather, heels and soles used in the filling of the orders. This request was refused upon the ground that the provisions of the Walsh-Healey Act, as they related to the
74 leather or the manufacture of rubber. In February, 1939, about four months after the final completion of the contracts, a second demand for inspection was made and refused.

The present controversy really started October 6, 1939, a year after completion of the orders. At that time an administrative complaint was served. An amended complaint was served Nov. 16th. The amended complaint charged the corporation with violation of the provisions of the fifteen contracts because of non-compliance with wage and hour provisions of the contracts in the tanneries and rubber mill where the leather, heels and soles were produced. The Corporation answered setting up the defense that the tanneries and rubber mills are not manufacturers within the purview of the Act and contracts. On December 9, 1939, a subpoena duces tecum was served upon the corporation and its secretary. The subpoena called for production, before a Hearing Officer, of records which can be divided into three classes. One class can be referred to as the records of the four designated footwear factories. These, I understand, were made available. The other two classes can be described as the records of the tanneries, rubber mills, sole cutting, counter and carton plants or departments, where it is claimed some of the material used in the filling of the contracts was produced. These records were not produced at the hearing held on December 13th.

On January 15, 1941, the complaint in this action was filed. It sets forth the making of the contracts, the fixing of the minimum wages and maximum hours for employees engaged in the performance of the contracts; the belief that certain provisions of the contracts have been breached and the issuance of the administrative complaint and amended complaint and the notice of a hearing for December 13, 1939, as above mentioned.

75 It then generally summarized the allegations of the amended complaint. In substance, it alleges noncompliance with the maximum hour and wage provisions in the tanneries, rubber mill and carton department and noncompliance

with the wage provisions in the sole cutting departments and the belief that the persons employed in these plants and departments were employed in the performance of the contracts. The complaint then alleges generally the Department's authority to issue process, conduct hearings, make findings, etc. It also alleges issuance of subpoena and refusal to comply and, for relief, demands an order requiring defendants to obey the subpoena. Defendants, by denial and averments in their answer, make the claim that the operations of the tanneries and rubber mills are not covered by the Walsh-Healey Act and that, therefore, the Department of Labor has no authority over the records.

Defendants, in support of their position, have, through pleadings and affidavits, set forth facts regarding the industries, usages, and interpretations of the trade, interpretations and classifications made by the N. I. R. A., Census Department and other governmental agencies, rules and regulations of the Commerce Department, Public Contract and Wage and Hour Divisions of the Labor Department, etc. To say the least, they have raised an issue, partly factual and partly legal, that sometime and somewhere must be decided. They say it must be here decided because, if they are right, then an Order directing compliance with the subpoena would be the furthering "of an extra-legal inquisition to which this Court ought not to lend its aid." (*National Relations Board v. New England Transportation Co.*, 14 Fed. Sup. 497.)

76 Plaintiff makes no finding nor positive averment of authority to examine the records. She makes no attempt to refute or contradict defendant's claims. She says that the question, as to whether such employees were employed in performance of the Government contracts, is one of the questions in issue under the administrative complaint. She contends that the provisions of Section 5 of the Act, above named, deprives this court of jurisdiction to determine that question in this action or proceeding. I cannot agree with that contention. I believe that the court's powers and duties in this regard are correctly stated in *Securities & Exchange Commission v. Tung Corporation*, 23 Fed. Sup. 371.

The Act in question does not give general investigatory powers. It gives investigatory powers only over factories and employees engaged in the performance of governmental contracts. Defendants say the records sought do not cover such factories or employees. On this issue they are entitled to a hearing. The court should be reasonably satisfied that the Secretary has authority to inspect before ordering production.

Viewing this controversy from a practical as well as a legal angle, a pre-determination of the right to examine before actual examination seems to be the logical course to follow. In these

days of stress, when the time of courts, Government officials and manufacturers is at a premium, it would seem that a saving of both time and money may be affected through determination of right to examine before beginning the actual examination of hundreds and thousands of records.

Motions for judgment on the pleadings are denied. I consider this a summary proceeding. Decision on motion for Order should not be made until after a hearing on the issue raised. Date for such a hearing will be named upon request.

Dated February 1st, 1941.

FREDERICK H. BRYANT,
United States District Judge.

77

Order of February 10, 1941

United States District Court, Northern District of New York

[Same title.]

A motion having regularly been made by the plaintiff above named for a judgment on the pleadings in favor of the plaintiff upon the ground that on the undisputed facts appearing from the pleadings, plaintiff is entitled to judgment as a matter of law; and in the alternative for summary judgment in favor of the plaintiff on the ground that there is no genuine issue as to any material fact and plaintiff is entitled to such judgment as a matter of law; and in the further alternative that an order issue to defendants requiring them to appear before plaintiff or a representative designated by plaintiff to produce as and when so ordered the cards, books, statements and records referred to in paragraph 12 of the complaint and application herein, and to give testimony relating thereto:

And it appearing that paragraph 12 of the complaint and application herein is as follows:

"12. The defendants appeared in response to said subpoenas through the defendant Howard A. Swartwood, but wholly failed and refused to obey so much of such subpoenas as required them to bring with them and to produce all time cards, time books, employees' wage statements, and pay roll records showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the defendant Endicott Johnson Corporation in the factories or departments and for the periods hereinafter specified:

"Calfskin Tannery—March 22, 1937, to August 11, 1937; March 24, 1938, to June 1, 1938; Upper Leather Tannery—October 26, 1936, to September 21, 1938; Sole Leather Tannery—October 26,

1936, to October 11, 1938; Paracord Factory—October 26, 1936, to October 11, 1938; Sole Cutting Department (Endicott)—October 26, 1936, to October 11, 1938; Sole Cutting Department (Johnson City)—October 26, 1936, to October 11, 1938; Counter Department (Johnson City)—October 26, 1936, to October 11, 1938; Carton Department (Johnson City)—October 26, 1936, to October 11, 1938.

"The employees, factories, or departments, and periods covered by said cards, books, statements, and records are the same employees, factories or departments and periods referred to in the above paragraphs 7, 8, and 9.

78 On reading the complaint and application herein, the answer herein, and on reading and filing the notice of motion dated June 9, 1940, and the affidavit of Gerard D. Reilly, sworn to the 6th day of June 1940, with due proof of service of said notice of motion and affidavit, in favor of said motion; and after reading and filing the affidavit of Howard A. Swartwood, sworn to June 15, 1940, and the various affidavits, notices of motions, subpoenas duces tecum, official minutes of hearing held before William A. McIlwaine, Examiner, on December 13, 1939, and Rulings and Interpretations No. 2 (superseding No. 1, issued July 6, 1937) issued September 29, 1939 by the Division of Public Contracts of the United States Department of Labor, all of which are referred to and incorporated in said opposing affidavit of said Howard A. Swartwood and upon all the papers and proceedings herein; and after hearing Rawlings Ragland, Esq., Special Assistant to the Attorney General, of counsel for the plaintiff in favor of said motion, and Howard A. Swartwood, Esq., of counsel for the defendants in opposition thereto, and due deliberation having been had,

Now on motion of Howard A. Swartwood and William H. Pritchard, Esq., attorneys for the defendants, and on the decision of the court filed herein, it is hereby,

Ordered, that the plaintiff's motion for a judgment on the pleadings be and the same hereby is denied and dismissed, and

Further ordered, that the plaintiff's motion for summary judgment be and the same hereby is denied and dismissed, and

Further ordered, that the plaintiff's motion that an order issue to defendants requiring them to appear before plaintiff or a representative designated by plaintiff to produce as and when so ordered the cards, books, statements and records referred to in paragraph 12 of the complaint and application herein and/or to give testimony relating thereto be and the same hereby is denied until the further order of this court to be made after a hearing on the issues raised by the denials and averments in defendants' answer shall be held before this court, and

79 Further ordered, that all other and further proceedings whatsoever to compel or require the defendants to appear before plaintiff or a representative of plaintiff, or any other person, administrative agency or department, or any other court or tribunal, or elsewhere than before this court, to produce said cards, books, statements, and records referred to in paragraph 12 of the complaint and application herein and/or to give testimony relating thereto, be and the same hereby are stayed until the further order of this court to be made after a hearing on the issues raised by the denials and averments in defendants' answer shall be held before this court, and

Further ordered, that Frances Perkins, as Secretary of Labor of the United States and all persons employed by or acting for or on her behalf as such Secretary of Labor, be and they hereby are enjoined and restrained from further prosecuting or taking any action whatsoever to compel or require defendants to appear before plaintiff or a representative of plaintiff, or any other persons, administrative agency or department, or any other court or tribunal, or elsewhere than before this court, to produce said cards, books, statements and records referred to in paragraph 12 of the complaint and application herein and/or to give testimony relating thereto, until the further order of this court to be made after a hearing on the issues raised by the denials and averments in defendants' answer shall be held before this court.

February 10th, 1941.

(Sgd.) **FREDERICK H. BRYANT,**
Frederick H. Bryant,
United States District Judge.

80 *Motion to Vacate Order of February 10, 1941*

District Court of the United States for the Northern District of
New York

[Same title.]

MOTION TO VACATE ORDER OF FEBRUARY 10, 1941; FOR REARGUMENT OF
PRIOR MOTION OF PLAINTIFF; OR TO RESETTLE SAID ORDER OF FEBRUARY,
10, 1941

Please take notice that on all the proceedings heretofore had herein, the undersigned will move this Court on the 19th day of February, 1941 at 10 o'clock in the forenoon, at Malone, New York, for an order vacating the order made and entered herein the 10th day of February 1941, and for a reargument of plaintiff's motion in the alternative for judgment on the pleadings, for summary judgment, or for an order enforcing compliance with the subpoenas

referred to in the complaint and application herein; and on such reargument for an order granting plaintiff's said motion in one of its alternatives;

Please take further notice that at the same time and place the undersigned will move, if the foregoing motion to vacate and for reargument be not granted, for an order resettling the order made and entered herein the 10th day of February 1941 in the form submitted herewith;

Please take further notice that unless said motion to vacate and for reargument be granted, or unless said motion to resettle be granted, the undersigned will at the same time and place move for an order vacating the last two ordering paragraphs of the order made and entered herein on the 10th day of February 1941.

As grounds for the foregoing motion, plaintiff will rely upon the grounds supporting the original motion in the alternative herein, and in addition upon the following grounds:

81 (1) The provisions of the last two ordering paragraphs of the order of February 10, 1941, are outside the jurisdiction of the Court, as to subject matter, person of the plaintiff, and venue.

(2) Defendants have failed to plead or prove facts entitling them to the relief granted by such provisions, or to any affirmative relief.

(3) Defendants have not prayed for such relief or for any affirmative relief.

(4) Such relief was granted without due notice to plaintiff and without adequate opportunity to defend against an application therefor and is in violation of the due process requirements of the United States Constitution.

(5) Such relief is beyond the scope of the Court's opinion in connection with which the order was entered.

(6) Such relief is beyond the scope of the present case.

(7) Such relief is unauthorized by law and the granting thereof constitutes an assumption by the Court of administrative functions fixed by the Constitution and by Congress in the Executive Department of the Government and an unauthorized interference with administrative functions.

(8) The granting of such relief is in violation of the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure.

(9) The granting of such relief is in violation of the provisions of Rule 65 of the Rules of Civil Procedure including paragraphs (a) (b) (c) and (d) thereof, and of Sections 381, 382 and 383 of Title 28, United States Code.

(10) The granting of such relief is in violation of the provisions of the Act of March 23, 1932, Chapter 90 (47 Stat. 70) United States Code, Title 29, Chapter 6.

(11) The granting of such relief is in effect the granting of a counterclaim against an officer of the United States in violation of Rule 13 (d) of the Federal Rules of Civil Procedure.

82 (12) The granting of such relief is in effect subjecting the United States to suit without the consent of Congress.

(13) Such relief was taken against Plaintiff by surprise.

FRANCIS M. SHEA,
Assistant Attorney General
RALPH L. EMMONS,
United States Attorney
Attorneys for Plaintiff.

TO MESSRS. HOWARD A. SWARTWOOD and
WILLIAM H. PRITCHARD,
Attorneys for Defendants.

83 *Order of February 19, 1941 resettling order of February 10, 1941*

District Court of the United States For the Northern District of New York

[Same title.]

This cause came on to be heard on the motion of the plaintiff to resettle the order made and entered herein the 10th day of February, 1941, and on consideration thereof and on all the proceedings heretofore had herein it is

Ordered that said order made and entered herein the 10th day of February 1941 be and the same is hereby resettled so as to read instead as follows:

"District Court of the United States for the Northern District of New York

"FRANCES PERKINS, SECRETARY OF LABOR OF THE UNITED STATES,
PLAINTIFF

against

"ENDICOTT JOHNSON CORPORATION, A CORPORATION, AND HOWARD A. SWARTWOOD, SECRETARY, ENDICOTT JOHNSON CORPORATION,
DEFENDANTS

"A motion having been regularly made by the plaintiff above named for a judgment on the pleadings in favor of the plaintiff upon the ground that on the undisputed facts appearing from the pleadings, plaintiff is entitled to judgment as a matter of law; and in the alternative upon the pleadings and all the records, files and

proceedings for a summary judgment in favor of the plaintiff on the ground that there is no genuine issue as to any material fact and plaintiff is entitled to such judgment as a matter of law; and in the further alternative that an order issue to defendants requiring them to appear before plaintiff or a representative designated by plaintiff to produce as and when so ordered the cards, books, statements and records referred to in paragraph 12 of the complaint and application herein and to give testimony in relation thereto.

84 "On reading the complaint and application herein, the answer herein, and on reading and filing the notice of motion dated June 9, 1940, and the affidavit of Gerard D. Reilly, sworn to the 6th day of June 1940, in favor of said motion; and after reading and filing the affidavit of Howard A. Swartwood, sworn to June 15, 1940, and on reading and filing all the papers which are referred to and incorporated in said affidavits and which have been submitted to me; and after hearing Rawlings Ragland, Esq., Special Assistant to the Attorney General, of counsel for the plaintiff in favor of said motion, and Howard A. Swartwood, Esq., of counsel for the defendants in opposition thereto, and due deliberation having been had,

"Now, on motion of Howard A. Swartwood and William H. Pritchard, Esqs., attorneys for the defendants, and on the opinion of the court filed herein, it is hereby,

"Ordered, that the plaintiff's motion for a judgment on the pleadings be and the same hereby is denied, and it is,

"Further ordered, that the plaintiff's motion for summary judgment be and the same hereby is denied, and it is,

"Further ordered, that the plaintiff's motion that an order issue to defendants requiring them to appear before plaintiff or a representative designated by plaintiff to produce as and when so ordered the cards, books, statements, and records referred to in paragraph 12 of the complaint and application herein and to give testimony relating thereto be and the same hereby is denied until the further order of this court to be made after a hearing as outlined in the Court's opinion, and it is,

"Further ordered, that in accordance with the Court's opinion herein and upon the application of plaintiff this cause shall be set down for further hearing before the Court.

"Dated February 10, 1941.

"(Signed) **FREDERICK H. BRYANT,**

"Frederick H. Bryant,

"United States District Judge."

And it is so ordered February 19, 1941.

(Signed) **FREDERICK H. BRYANT,**
United States District Judge.

Service of a copy of this order is admitted this 19th day of February 1941.

HOWARD A. SWARTWOOD,
Atty. for defendants.

85 *Plaintiff's notice of motion to amend complaint and application*

District Court of the United States for the Northern District of New York

[Same title.]

NOTICE OF MOTION TO AMEND COMPLAINT AND APPLICATION

To MESSRS. **HOWARD A. SWARTWOOD** and **WILLIAM H. PRITCHARD,**
Attorneys for Defendants,
Sales Building, Endicott, New York.

SIRS: Please take notice that at the hearing to be held in this matter before this Court, at the United States Court Room, Syracuse, New York, on the 10th day of March, 1941, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the undersigned will move to amend the complaint and application herein so as to add thereto the following allegations as paragraphs "14" and "15" thereof:

"14. The persons covered by the cards, books, statements and records referred to in paragraph 12 above, were employed by the defendant Endicott Johnson Corporation in the manufacture and furnishing of the materials, supplies, articles and equipment used in the performance of the contracts with the United States which are specified in paragraph 7 of this complaint and application.

"15. All the rubber heels and soles, all the counters, all the cartons, and substantially all the cut leather outer soles, middle soles, and inner soles, used by the defendant Endicott Johnson Corporation in the performance of the contracts specified in paragraph 7 of this complaint and application, were manufactured, processed, prepared and produced by persons employed by the defendant Endicott Johnson Corporation in factories, depart-

ments and places of said defendant, which persons, factories, departments and places are covered by the cards, books, statements and records referred to in paragraph 12 of this complaint and application."

Dated March 1, 1941.

(Sgd.) FRANCIS M. SHEA,
Francis M. Shea,
Assistant Attorney General.

(Sgd.) RALPH L. EMMONS,
Ralph L. Emmons,
*United States Attorney, Northern District of New York,
Attorneys for plaintiff.*

District Court of the United States for the Northern District of
New York

[Same title.]

NOTICE OF MOTION TO AMEND ANSWER

TO MESSRS. FRANCIS M. SHEA, *Assistant Attorney General of the United States* and RALPH L. EMMONS, *United States Attorney for the Northern District of New York, Attorneys for the Plaintiff.*

SIR: Please take notice that at the hearing to be held in this matter before this Court at the United States Court Room, Syracuse, New York, on the 10th day of March, 1941, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, the undersigned will move to amend the Answer herein by adding to and incorporating in the demand clause of said Answer the following words: "and for such other and further relief as to the Court may seem just and proper."

Dated March 5, 1941.

(Signed) HOWARD A. SWARTWOOD,

(Signed) WILLIAM H. PRITCHARD,
Attorneys for the Defendants.

87 *Order Allowing Amendments to Complaint and Answer*

District Court of the United States for the Northern District of
New York

[Same title.]

The Plaintiff having made a motion to amend its complaint and application by adding thereto the following allegations as Paragraphs 14 and 15 thereof:

"14. The persons covered by the cards, books, statements and records referred to in paragraph 12 above, were employed by the defendant Endicott Johnson Corporation in the manufacture and furnishing of the materials, supplies, articles and equipment used in the performance of the contracts with the United States which are specified in paragraph 7 of this complaint and application."

"15. All the rubber heels and soles, all the counters, all the cartons, and substantially all the cut leather outer soles, middle soles and inner soles, used by the defendant Endicott Johnson Corporation in the performance of the contracts specified in paragraph 7 of this complaint and application, were manufactured, processed, prepared and produced by persons employed by the defendant Endicott Johnson Corporation in factories, departments and places of said defendant, which persons, factories, departments and places are covered by the cards, books, statements and records referred to in paragraph 12 of this complaint and application."

And the defendant having made a motion to amend its answer by adding to and incorporating in the demand clause of said answer the following words: "and for such other and further relief as to the Court may seem just and proper." And both of said motions having come regularly on for hearing before this Court on the 19th day of March 1941, at Malone, New York, after due notice by each party to the other, and after hearing

88 Counsel for both Plaintiff and defendant.

It is hereby ordered that plaintiff's complaint may be amended by inserting therein said paragraphs 14 and 15, above mentioned.

Further ordered that defendants' answer may be amended by adding to and incorporating in the demand the words herein before set forth.

And, further ordered that defendants' answer may be further amended by inserting therein the following paragraphs:

"Eighteenth. Deny each and every allegation contained in said paragraph Number 14 of the complaint and application herein.

"Nineteenth. Deny each and every allegation contained in paragraph number 15 of said complaint and application except as the same are hereinbefore admitted in this answer."

Dated March 19th, 1941.

(Sgd.) **FREDERICK H. BRYANT**,
Frederick H. Bryant,
United States District Judge.

89 *Renewed Motions for Judgment on the Pleadings, etc.*

United States District Court, Northern District of New York

[Same title.]

Before Hon. **FREDERICK H. BRYANT**, *District Judge*, Malone, New York, March 19, 1941.

Appearances: Honorable Ralph L. Emmons, United States Attorney in and for the Northern District of New York, Federal Building, Binghamton, New York, and David Lloyd Kreeger, Esquire, Special Assistant to the Attorney General, Washington, D. C., and Clifford P. Grant, Esquire, Attorney, Division of Public Contracts, Department of Labor, Washington, D. C., Solicitors for the Government; Howard A. Swartwood, Esquire, Attorney and Counselor at Law, Endicott, New York, and William H. Pritchard, Jr., Esquire, Attorney and Counselor at Law, Endicott, New York, Solicitors for the Defendants.

Mr. KREEGER. Now Your Honor I should like to renew briefly the motions which were made before Your Honor on the affidavit of Mr. Reilly and the notice of motion to the Defendants that judgment be granted on the pleadings; in the alternative that summary judgment be granted; and in the further alternative that an order be issued directing the Defendants to appear in response to the subpoenas and produce documents mentioned therein. The basis is that there is no longer any substantial issue of law and fact in view of the Defendants' admission that the materials, rubber and leather which were produced at its tanneries and rubber mills were used in the manufacture of shoes under the contract.

The COURT. I don't say that it is to be denied or that it is to be granted. I will reserve decision on it.

90

Memorandum

A certain stipulation was entered into between counsel for the respective parties on March 19, 1941.

91 *Order setting aside stipulation and setting the case down for a hearing*

District Court of the United States for the Northern District of New York

[Same title.]

It appearing to the Court that there has been and still is a misunderstanding between counsel for the respective parties as to the effect and scope of a stipulation entered into between them during a hearing held at Malone, N. Y., on March 19, 1941,

It is hereby ordered, that all proceedings had, and affidavits, appendices, exhibits and other papers filed herein subsequent to March 19, 1941, together with said stipulation of March 19, 1941, be nullified and expunged from this proceeding and that they shall not be considered as a part of the record herein;

Further ordered, That in accordance with the decision of the Court dated February 1, 1941, and the order the Court made on February 19, 1941, this matter be set down for a hearing before this Court at Syracuse, N. Y., on April 24th, 1941 at 11:00 A. M. or as soon thereafter as counsel can be heard.

FREDERICK H. BRYANT,
U. S. District Judge.

Dated April 16, 1941.

92 *Stipulation as to authenticity of copies*

District Court of the United States, Northern District of New York

[Same title.]

STIPULATION

It is stipulated that the following documents are true copies of what they purport to be:

1. Code of Fair Competition for the Rubber Manufacturing Industry, approved December 15, 1933, Approved Code No. 156, Registry No. 899-04, printed by United States Government Printing Office, Washington 1933.

2. Amendment to Code of Fair Competition for the Rubber Manufacturing Industry, approved April 30, 1934, Approved Code

No. 156—Amendment No. 1, Registry No. 899-04, printed by United States Government Printing Office, Washington 1934.

3. Amendment to Code of Fair Competition for the Rubber Manufacturing Industry, approved September 1, 1934, Approved Code No. 156—Amendment No. 2, Registry No. 899-04, printed by United States Government Printing Office, Washington, 1934.

4. Amendment to Code of Fair Competition for the Rubber Manufacturing Industry, approved December 18, 1934, Approved Code No. 156—Amendment No. 3, Registry No. 899-04, printed by United States Government Printing Office, Washington, 1934.

5. Code of Fair Competition for the Boot and Shoe Manufacturing Industry, approved October 3, 1933, Approved Code No. 44—Reprint, Registry No. 904-1-05, printed by United States Government Printing Office, Washington 1934 (includes Amendment No. 1).

6. Proposed Code of Fair Competition for the Rubber Heel and Sole Manufacturing Industry, Submitted August 31, 1933, Registry No. 803-1-01, printed by United States Government Printing Office, Washington, 1933.

93 7. Proposed Code of Fair Competition for the Rubber Footwear Industry, submitted July 29, 1933, Registry No. 801-1-01, printed by United States Government Printing Office, Washington, 1933.

8. Code of Fair Competition for the Leather Industry, as revised August 23, 1933, and approved September 7, 1933, Registry No. 930-1-01, printed by United States Government Printing Office, Washington, 1933.

9. Amendment to Code of Fair Competition for the Leather Industry, approved February 16, 1934, Approved Code No. 21—Amendment No. 1, Registry No. 930-1-01, printed by United States Government Printing Office, Washington, 1934.

10. Amendment to Code of Fair Competition for the Leather Industry, approved October 3, 1934, Approved Code No. 21—Amendment No. 2, Registry No. 930-1-01, printed by United States Government Printing Office, Washington, 1934.

11. Amendment to Code of Fair Competition for the Leather Industry, approved March 5, 1935, Approved Code No. 21—Amendment No. 3, Registry No. 930-1-01, printed by United States Government Printing Office, Washington, 1935.

12. Press Release, dated Tuesday, March 26, 1940, No. R-703, United States Department of Labor, Wage and Hour Division, Washington, D. C.; Title 29—Labor, Chapter V—Wage and Hour Division: In the Matter of the Recommendation of Industry Committee No. 6 for a Minimum Wage Rate in the Shore Manufacturing and Allied Industries; Wage Order Effective April 29, 1940.

13. Decision of the Secretary, Department of Labor, Washington, D. C., in the Matter of Determination of the Prevailing Minimum Wage in the Men's Welt Shoe Industry, dated December 21, 1937.

14. Circular Letter No. 200, of Procurement Division, Treasury Department, Branch of Supply, dated January 5, 1937, issued to the Heads of all Departments and Establishments by H. E. Collins, Assistant Director of Procurement. Subject: Bidding with respect to the application of the Walsh-Healey Public Contracts Act (Public, No. 846, 74th Congress) to certain phases of the Automobile Industry. This sets forth copy of a letter received from Acting Administrator of the Public Contracts Act, dated December 30, 1936, addressed to William S. Elliott, Vice President and General Counsel, International Harvester Company, Inc.

Dated March 3, 1941.

(Sgd.) FRANCIS M. SHEA,
Attorney for Plaintiff.

(Sgd.) WILLIAM H. PRITCHARD,
Attorney for Defendants.

95

Transcript of Proceedings at Hearing

In the United States District Court for the Northern District of
New York

[Same title.]

Minutes of proceedings had in the above-entitled matter at a Regular Term of the United States District Court held in and for the Northern District of New York, Federal Building, Syracuse, New York, on Thursday, April twenty-fourth (24th), 1941, commencing at two-thirty o'clock in the afternoon, Eastern Standard Time.

Presiding: Honorable FREDERICK H. BRYANT, *United States District Judge.*

96 Appearances: Honorable Ralph L. Emmons, United States Attorney in and for the Northern District of New York, Federal Building, Binghamton, New York; and David Lloyd Kreeger, Esquire, Special Assistant to the Attorney General, Washington, D. C.; and Clifford P. Grant, Esquire, Attorney, Division of Public Contracts, Department of Labor, Washington, D. C., Solicitors for the Government; Howard A. Swartwood, Esquire, Attorney and Counselor at Law, Endicott, New York; and William H. Pritchard, Jr., Esquire, Attorney and Counselor at Law, Endicott, New York, Solicitors for the Defendants.

97 **THE CLERK OF THE COURT.** In the Matter of Francis Perkins, Secretary of Labor, against Endicott Johnson Corporation, a Corporation, and Howard A. Swartwood, Secretary, Endicott Johnson Corporation.

THE COURT. As I understand for this record, we are to take the record of the hearing in Malone up to the point where I reserved decision on the motions that were made. From there on it is to be a new record.

MR. KEEGER. Yes, Your Honor.

THE COURT. I wish to state at this time that I am concerned with only one issue, and that is whether or not the operations of the plants in question, by Endicott Johnson Company, are within the provisions of the Walsh-Healey Act. If they are, or I so find, of course, the Labor Department are entitled to an order or judgment directing a subpoena. If I find they are not, of course I shall deny it. I shall exclude on this hearing every bit of evidence that does not directly bear upon that one question with which I am interested.

98 **MR. SWARTWOOD.** If Your Honor please: Before Mr.

Kreeger proceeds, when we were here arguing this motion to expunge, on April sixteenth, I stated that if we had to call witnesses that were important men in the tanneries, I would have to take some time to get them here by automobile. Due to the fact the hearing did not start until two, I made no arrangements to bring them today. However, whether or not it will be necessary, will depend on what the Plaintiff puts in the record this afternoon, and I can have them here tomorrow morning, if necessary.

MR. KEEGER. It is my understanding, as Your Honor stated, that this hearing will supersede the last hearing, held March nineteenth, 1941, at the point where the first witness was sworn for the Plaintiff, so as a part of the record of this hearing there are the motions made by the parties to amend the complaint and application and the answer, which Your Honor granted, and the renewal of the motion by the Government for its alternative

99 relief of judgment on the pleadings, summary judgment, or an order enforcing the subpoenas—on which Your Honor reserved decision.

It is my further understanding, Your Honor, that you will decide this case on the pleadings, on the complaint and application, and the answer, as amended, plus the record of this hearing!

THE COURT. That is right.

WILLIAM B. GROGAN, called as a witness in behalf of the Government; and being duly sworn, testified as follows:

Direct examination by **MR. KEEGER**:

Q. **Mr. Grogan**, will you state your name and title?

A. William B. Grogan, Chief Examiner, Division of Public Contracts, United States Department of Labor.

Q. What are your duties and functions?

The Court. I think you had better stand while you are questioning.

Mr. KATZMAN. Yes, sir.

100

By Mr. KATZMAN:

Q. What are your duties and functions, Mr. Grogan?

A. As Chief Examiner I am the Chief Legal Officer of the Division. Among other duties and functions I decide the legal questions that are presented to the Division, in the course of its operation.

Q. Before you were Chief Examiner of the Division, what was your position, and your functions and duties.

A. I was Assistant to the then Chief of the Division.

Q. What periods did that cover?

A. I first came with the Division in June of 1937. For a period of approximately four or five, perhaps four months, I was an Examiner, and after that I became Assistant to the Chief. I became Chief myself a year ago last June.

Q. As Chief you pass on all questions of law before the Division?

A. Yes.

Q. Are you personally familiar with the rulings and decisions of the Division under the Walsh-Healey Act?

A. Yes.

Q. Are you personally familiar with the documents in the files of the Division concerning the fifteen contracts
101 awarded to the Endicott Johnson Corporation, and referred to in the complaint and application in this case?

A. I think so.

Mr. KATZMAN. Your Honor, I have here the fifteen contracts in question, and the last time we were before you you suggested we might agree on the relevant portions of the contracts. I am perfectly willing to do that, and I have certain excerpts indicated here, which come to about seven pages, and I will be willing, if Your Honor finds it agreeable, to introduce these fifteen contracts subject to their being superseded by portions designated by me, and portions designated by—

The Court (interrupting). I will admit the contracts in evidence, and you can then specifically introduce certain portions, or call my attention to certain portions, but I will receive the contracts, and have them marked in evidence so they will be before the Court in their entirety.

102

Mr. SWARTWOOD. I should think, if Your Honor please, the portions Mr. Kreeger thinks important will be a matter for brief and not for evidence.

By Mr. KREEGER:

Q. Mr. Grogan, you might step down and identify these fifteen documents which I now hand you?

A. This is a copy of a contract awarded to the Endicott Johnson Corporation.

The COURT. By showing them to Mr. Swartwood, and getting his agreement those are the fifteen contracts.

Mr. SWARTWOOD (interrupting). I have a list. I think we can do that.

Mr. KREEGER. These, Your Honor, are all certified by the Comptroller General as true copies of the contracts in question.

Mr. SWARTWOOD. Are these the same contracts introduced in the hearing December thirteenth, before the Department in Binghamton?

Mr. KREEGER. Yes; they are. As a matter of fact, they still have the exhibit number as having been introduced when you were the witness.

Mr. SWARTWOOD. Are they in order?

Mr. KREEGER. No; I think not. I suggest they be marked "Government Exhibit one," parenthesis one through fifteen.

The COURT STENOGRAPHER. How about one A, One B?

Mr. SWARTWOOD. These appear to be the same introduced before the Department on December thirteenth, and I have no objection to their admission in evidence.

The COURT. Received.

(Photostatic Copies of fifteen contracts awarded by the Government to Endicott Johnson Corporation, received in evidence as Government's Exhibit Number 1-A through 1-O.)

Mr. KREEGER. Mr. Grogan—

The COURT (interrupting). Let him mark them.

(The stenographer marked the Exhibits.)

By Mr. KREEGER:

Q. Mr. Grogan, how does the Public Contracts Division receive notification that a Government contract has been awarded?

104 Mr. SWARTWOOD. That is objected to as not within the issues.

The COURT. Sustained.

Mr. KREEGER. I should like to have marked for identification fifteen papers entitled "Notice of Award of Contract," as "Government's proposed exhibit 2-A through O."

(Fifteen papers, each entitled "Notice of Award of Contract," marked "Government's Exhibit 2-A through 2-O" for identification of this date.)

By Mr. KREEGER:

Q. Mr. Grogan, I show you proposed Government Exhibit 2-A through 2-O, each entitled "Notice of Award of contract." Will you kindly identify each of these?

Mr. SWARTWOOD. I renew my objection. I have no objection to having Mr. Kreeger offer them in evidence, but object to the witness testifying to the contents.

Mr. KREEGER. I think it is proper for a witness to identify them, as a foundation to my offering them in evidence.

105 The COURT. I will allow it, if he makes no comments of the contracts.

Mr. GROGAN. These are notices of awards of contracts from contracting officers to the Division of Public Contracts.

By Mr. KREEGER:

Q. Were these notices of award received by the Public Contracts Division?

A. Yes, sir.

Mr. KREEGER. I should like to offer in evidence as Government's Exhibit 2—

The COURT (interrupting). I assume they are all similar.

Mr. KREEGER. All similar, Your Honor.

(Notices handed to the Court for examination.)

Mr. SWARTWOOD. Your Honor, I object to the introduction of these Exhibits, 2-A through O, inclusive, on the ground they are not within the issues of this hearing stated by Your Honor.

The COURT. Overruled.

Mr. SWARTWOOD. Exception.

The COURT. They may be marked.

106 Fifteen papers, each entitled "Notice of Award of Contract" previously marked for identification, received in evidence and marked "Government's Exhibit Number 2-A through 2-O.")

Mr. SWARTWOOD. If Your Honor please: I object to the introduction. They are communications between two different Departments of the Government, and not in any way binding on the Defendant.

The COURT. Same ruling.

Mr. SWARTWOOD. Exception please.

By Mr. KREEGER:

Q. Mr. Grogan, will you state when the Public Contracts Division received copies of the originals of the fifteen contracts that have been introduced in evidence as Government Exhibit One?

A. I couldn't tell you the exact date upon which these contracts, or copies thereof, were received by the Division, but they were

received not at or about the time of the award, but the time the Department was contemplating formal proceedings.

Q. Could you be a little more exact, Mr. Grogan—within one or two months of the year?

107 A. I would say at or about—Oh, in the late summer preceding the hearing.

Q. When?

A. Preceding the Administrative Hearing in this matter.

Q. Would that be the late summer of 1939?

A. That is right.

Q. Do you know whether the contracts were received prior to June 1938?

A. The contracts here involved?

Q. Yes.

A. They were.

Q. Were received by the Public Contracts Division prior to June 1938?

A. I assume I didn't get the question. May I have it again?

Q. Do you know for a fact whether or not these contracts were received by the Public Contracts Division prior to June 1938?

A. They were not.

Q. Mr. Grogan, in the normal course of business of the Division, is it the practice to receive contracts, copies of Government
108 contracts, without a specific request made therefore by the Division?

The COURT. I don't think there is any necessity of going into that. I am going to rule out that line of testimony. I am not interested in it. I am not at all interested in the activities of the Department or the activities of the Department in this hearing.

Mr. KREEGER. May I state, Your Honor, the reasons underlying this question? In your opinion of February first, Your Honor, you alluded to the fact the contracts contain certain statements and representations which were deemed to raise an issue, or at least put—

The COURT (interrupting). I am restricting this hearing to the statement I made at the beginning of this hearing.

By Mr. KREEGER:

Q. Mr. Grogan, I call your attention in Exhibit 2 of the Government to the fact that each one states, "To be manufactured at, or supplied from," and then the name and location of plants are filled in. I call your attention to the fact that in several of these
109 "George F. Tabernacle," Binghamton, or "George F. Tabernacle" Factory is designated; in one the "Scout" Factory at Johnson City is designated; in one the Endicott Johnson Corporation alone is designated; and in one the "Sunrise" Factory.

Johnson City, New York, is designated. I also call your attention to the fact that the same designation is made in the contracts that have been introduced as Government's Exhibit 1, corresponding to the proper part of Government's Exhibit 2.

Mr. SWARTWOOD. Is that a question, Mr. Kreeger?

Mr. KREEGER. No; merely laying the basis for the question.

By Mr. KREEGER:

Q. Will you state whether the Division has anything to do with supplying the designations of place of manufacture or supply?

Mr. SWARTWOOD. That is objected to, if Your Honor please!

The COURT. Just a moment.

Mr. SWARTWOOD. It doesn't seem it is within the issues.

The COURT. Sustained.

Mr. KREEGER. May I take an exception, Your Honor?

110

Mr. KREEGER:

Q. When the contracts are received, and the notice of award—notice of award are received, by the Division, specifically those introduced as Exhibit 1 and 2, do they contain the designation of the plant, and place of performance? That is, when they are received by the Division?

A. There is a designation which indicates where performance will probably be had.

Q. Will you state of your own knowledge whether there has been any communication with you, or, so far as you know, to the Division, with respect to what plant or factory should be inserted in the contract, or notices of award?

Mr. SWARTWOOD. Objected to on the same ground.

The COURT. Sustained.

Mr. KREEGER. May I have an exception?

By Mr. KREEGER:

Q. Under the regular practice of the Division, in the course of its business under the Walsh-Healey Act, Mr. Grogan, does the specification of the place of performance in the contract determine or restrict the plants to which the Division sends its Investigators?

111

Mr. SWARTWOOD. Objected to as a conclusion.

The COURT. Sustained.

Mr. KREEGER. I ask an exception, Your Honor.

By Mr. KREEGER:

Q. Mr. Grogan, of your personal knowledge, are you aware of any instances which have come to your attention, as Chief Officer of the Division, in which investigations were made at plants other than those specified in a particular contract, in order to determine

whether there was compliance with the Walsh-Healey stipulation in that contract?

A. There are many such cases.

Mr. SWARTWOOD. There are?

Mr. GROGAN. There are.

By Mr. KREEGER:

Q. As Chief Legal Officer of the Division, of course, you are personally familiar with any cases where the contracts do not stipulate any place or performance whatever?

Mr. SWARTWOOD. That is objected to.

112 The COURT. Sustained. I am not interested in any of this line of questioning because it is outside the issue I said I was going to decide this matter on.

Mr. KREEGER. Your Honor, I should like to state for the record that the legal basis for this line of questioning is to show a consistent practice of the Division with respect to construction of a certain term that appears in practically each contract.

The COURT. That may go in a brief, if you want, but it is not coming into the evidence.

Mr. KREEGER. May the record show, Your Honor, if the witness were allowed to testify he would show it is a consistent practice of the Division not to regard itself as bound by the specification of the factory in the contract or the notice of award?

Mr. SWARTWOOD. I don't like to object to statements because there is no jury, and I know it won't prejudice you, but I don't think counsel should be permitted to make statements in the record which Your Honor excluded, and doing it by way
113 of offering to prove.

The COURT. You may make your case, and I will rule.

Mr. KREEGER. I am merely seeking to save time by summing up, by saving rulings on each question. If you prefer the more detailed method of procedure, I will follow that.

The COURT. All right.

Mr. SWARTWOOD. May Mr. Kreeger's previous statement be stricken from the record?

The COURT. Yes.

Mr. KREEGER. I would like to have an exception, Your Honor.

By Mr. KREEGER:

Q. Mr. Grogan, upon receipt by the Division of these notices of award, in the case now before us, what action was taken by the Public Contracts Division?

A. That is on the receipt of notice of award—that notice is sent to the Inspection Division, and this notice was sent as are all others, in a routine way.

Q. Will you state what followed?

114 A. After the notices were received by the Inspection Service, they, the Inspection Division, they would conduct an investigation in the plants; in fact, they conducted several investigations.

Q. What plants were investigated?

The COURT. Well, he doesn't know [pause]. I assume you didn't make any investigation personally? [This latter part to the Witness.]

Mr. GROGAN. That's right.

By Mr. KREEGER:

Q. As Chief Legal Officer, you received official notification that investigation had been or was being made at the plants of Endicott Johnson?

A. I received the report of the investigator in due course.

Q. What plants did these indicate were being investigated?

Mr. SWARTWOOD. That is objected to.

The COURT. Sustained.

Mr. KREEGER. Exception, Your Honor. I should like to have marked for identification two pamphlets entitled "Rulings and Interpretations under the Walsh-Healey Public Contracts Act," and "Rulings and Interpretations, No. 2," as
115 Government's Exhibit 3-A and B.

(Two pamphlets, "Rulings and Interpretations, No. 1 and No. 2," marked "Government's Exhibits 3-A and 3-B" for identification of this date.)

Mr. SWARTWOOD. That is what?

By Mr. KREEGER:

Q. Will you identify these, Mr. Grogan?

A. These are official publications of the Department, known as "Rulings and Interpretations." The white cover is "Rulings and Interpretations" No. 1, and the green is "Rulings and Interpretations" No. 2.

Mr. KREEGER. I offer them in evidence as the Government's next exhibit, Your Honor.

Mr. SWARTWOOD. If Your Honor please, I have no objection to the introduction of these exhibits for the information of the Court, in order to pass on the question now before it, but I should like to object to the introduction of the paper Government's

116 Exhibit 3-B, which is "Rulings and Interpretations"

No. 2, because it appears that was not promulgated until September twenty-ninth 1939, more than a year after the completion of the contracts in this case.

Mr. KREEGER. If the Court please: These rulings were promulgated prior to the institution of the action in this case, both Administrative and legal action, and I think they have distinct bearing on the propriety of the action.

The COURT. I shall receive them simply for the advice of the Court in determining the question which must be determined upon the facts of this case. These are not received as bearing on the facts.

(Two pamphlets, "Rulings and Interpretations, No. 1 and No. 2," received in evidence, and marked "Government's Exhibits 3-A and 3-B" of this date.)

Mr. SWARTWOOD. My only objection, which I now renew, is the fact the "Ruling" No. 2 was issued nearly a year after the completion of the contracts.

117 The COURT. I will bear that in mind when I am considering the pamphlets.

By Mr. KREEGER:

Q. Mr. Grogan, in the portion of this Exhibit 3-A, entitled, "Regulations Prescribed by the Secretary of Labor, Under Public Act #846, Seventy-fourth Congress," there are three provisions headed, "Article 101-A, 102, and Article 501." I should like you to read those.

The COURT. Why should he read them? I can read them.

Mr. KREEGER. I should like to have the witness state if he is familiar with those, Your Honor, [pamphlet #1 handed to the Witness].

By Mr. KREEGER:

Q. Article 101-A, 102, and 501.

(Witness reading the Articles mentioned.)

A. Yes; I am familiar with them.

Q. Are you personally familiar with the practice and rulings of the Division, made in the application of those regulations?

118 Mr. SWARTWOOD. That is objected to.

The COURT. Sustained.

Mr. KREEGER. Exception, Your Honor.

By Mr. KREEGER:

Q. As Chief Legal Officer, have there been submitted to you questions under those Articles that have been cited, which involve the question of whether work performed under Government contract—

Mr. SWARTWOOD (interrupting). I object.

Mr. KREEGER. By employees—let me finish my question, please.

Mr. SWARTWOOD. Sorry.

Mr. KREEGER. By employees of a contractor who are also working on inseparable work for commercial contracts, or for other contracts not connected with the Government contract, are subject to the Walsh-Healey Act with respect to any portion or all of their work?

Mr. SWARTWOOD. I object to the question generally on the ground that it is not confined to the contracts involved in this proceeding, or to the Defendants in this proceeding, and, further, specifically, upon the ground that no time is specified
119 as to whether it was during or since the performance of the contracts by the Defendant, and whether or not it should have had any knowledge of such rulings or interpretations by Mr. Grogan's Department prior to the completion of the contract.

The COURT. I shall sustain—and all or further questions I regard as immaterial to the issue here involved.

Mr. KREEGER. If I may be heard on that, Your Honor.

The COURT. No; you may have an exception.

Mr. KREEGER. Exception.

The COURT. I am going to confine you to that one issue.

Mr. KREEGER. I would like to cite the Norwegian Nitrogen Case and the Fawcus case, in the Supreme Court, where it is said that great weight will be given by the Court in determining—

The COURT (interrupting). It will be given great weight, but that comes under a brief, and your citations of your decisions. It is not coming in here as evidence.

Mr. KREEGER. Do I understand Your Honor to rule—

120 The COURT (interrupting). I thought I made myself clear. Evidently it is difficult to make you understand. I have just one issue to try in this matter, and that is whether the operations of the tanneries, the operations of the rubber plants, and those other factories, are within the provisions of the Walsh-Healey Act. I am not at all concerned in this hearing to what the Labor Department have done, or have not done, in the way of making investigations. The only material part of the investigations are any facts contained therein which bear on the question of whether those factories are under the provisions of the Walsh-Healey Act. As I stated before, the question of violation by the Defendant, if they are, rests with the Department of Labor. So, just confine yourself to that one issue.

Mr. KREEGER. Your Honor, I am doing my best to do so. The question had no relation whatever to violation of the act by the Defendant. What I am trying to show is that it was the consistent practice of the Division to cover all employees who
121 work any part of their time on Government work. One of the Defendant's contentions, upon which basis he urged the

hearing be held, was that the work was inseparable insofar as the Government contracts were concerned.

The COURT. Show that if you want to but not by showing rulings made in some other case where the facts are unknown to the Court or to the Defendant.

Mr. KREEGER. But, Your Honor, my purpose is to show—

The COURT (interrupting). You may have your exception. I am not going to change that ruling.

Mr. KREEGER. All right, Your Honor.

By Mr. KREEGER:

Q. As Chief Legal Officer of the Division, Mr. Grogan, have you been asked for your legal ruling on the question of whether or not under these regulations promulgated by the Secretary under the Walsh-Healey Act employees employed in the tanneries, rubber mills, and other departments of the defendant, are subject to the Act, notwithstanding that part of their time
122 was spent in tanning leather, or producing heels and soles that do not go into Government contracts?

The COURT. Just a moment [to Mr. Swartwood]. You object to that?

Mr. SWARTWOOD. I object to it, but—no, I will withdraw my objection.

The COURT. I don't think I should allow that. That is the question I have to decide, and it might be embarrassing to overrule Mr. Grogan on it [laughter].

Mr. SWARTWOOD. As I understood it, the question was whether he had ever been asked.

The COURT. If it is just that.

Mr. SWARTWOOD. I have no objection to whether he has been asked.

The COURT. I will withdraw—just answer yes or no.

Mr. GROGAN. I have been asked.

Mr. KREEGER. What has been your response?

Mr. SWARTWOOD. That is objected to as not binding on the Defendants.

The COURT. Sustained.

By Mr. KREEGER:

Q. Has the action taken by the Public Contracts Division
123 in connection with the Endicott Johnson Corporation, insofar as coverage of the tanneries, rubber mills, and other departments is concerned, differed in any way from the action taken by the Division in any other similar case involving manufacture by the contractor of the raw, semifinished, or intermediate products which went into the fulfilling of the Government contract?

Mr. SWARTWOOD. Same objection.

The COURT. Same ruling.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. Mr. Grogan, I call your attention to paragraph two, on page two of Government Exhibit 3-B [witness examining the paragraph]. Are you personally familiar with the facts and circumstances surrounding the promulgation of that interpretation and ruling?

A. I am.

Q. Will you state to the Court what the facts and circumstances are?

Mr. SWARTWOOD. That is objected to on the ground it is not within the issue involved; not binding on the Defendant,
124 as it affirmatively appears that ruling was not promulgated for almost a year after the completion of these contracts.

The COURT. Sustained.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. To your knowledge, Mr. Grogan, did this paragraph I called to your attention change the existing rule in the Division?

Mr. SWARTWOOD. Same objection.

The COURT. Same ruling.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. Have you, as Chief Legal Officer of the Division, participated in making, or made any legal rulings contrary to the provision of paragraph two, before the date of its promulgation?

Mr. SWARTWOOD. Same objection.

The COURT. Same ruling.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. Have you personal knowledge of other cases in which
125 the Government contractor performed other acts than the final fabrication of the finished product called for by the contract?

Mr. SWARTWOOD. Same objection.

The COURT. Answer "Yes" or "No."

Mr. GROGAN. Yes.

By Mr. KREEGER:

Q. Will you state several illustrations?

Mr. SWARTWOOD. That is objected to as not within the issue, and not binding on us in any way, unless he shows it came to our knowledge.

The COURT. Read the next to the last or the last question.

(The stenographer repeated the question as follows: "Have you personal knowledge of other cases in which the Government contractor performed other acts than the final fabrication of the finished product called for by the contract.")

Mr. KREEGER. Do I understand Your Honor has ruled on the question immediately following that?

Mr. SWARTWOOD. The one following was sustained.

126 Mr. KREEGER. I should like to have marked for identification certified copies of certain letters and memoranda addressed to or signed by officials in the Public Contracts Division as Government's Exhibit 4-A through 4-E.

(Certified Copies of correspondence marked "Government's Exhibit 4-A" through 4-E for identification of this date.)

By Mr. KREEGER:

Q. Mr. Grogan, I show you proposed Government's Exhibit 4-A, 4-B, 4-C, 4-D, and 4-E. Will you kindly identify them?

Mr. SWARTWOOD. If your Honor please: It appears these are certified copies of letters written by the administrator of the Division to companies other than the defendants in this case, ruling upon some specific questions and—

The COURT (interrupting). Well, I think I will allow him to identify them.

Mr. SWARTWOOD. Very well.

The COURT (to the witness). What they are, without giving the contents.

127 Mr. GROGAN. The first is a letter, or is a series of letters, between the Administrator of the Public Contracts Division and the Alabama Marble Company.

Mr. SWARTWOOD. In order that I may get a specific objection to each of these, I should like him to offer them separately, so I can object as we go along.

Mr. KREEGER. Have you identified each one of them?

The COURT. No; just the first.

Mr. KREEGER. I offer this in evidence as Government's Exhibit 4-A.

The COURT (to Mr. Swartwood). Do you object?

Mr. SWARTWOOD. The Defendants object to the introduction of Exhibit 4-A, relating to the Alabama Marble Company, first on the ground it is not within the issues before the Court in this proceeding, at this particular hearing, and, further, on the ground it is not binding on the Defendants for the reason the correspondence is dated March 2, 1939, March 23, 1939, April 26, 1939, and May 4, 1939, which is approximately six months after the completion of the contracts in question in this case.

128 Mr. KREEGER. Your Honor, this exhibit has been offered not in order to bind the contractor, Endicott-Johnson Corporation, by any specific ruling, but to show consistent lines—

The COURT. I shall sustain the objection. I think it is a matter that should be in briefs under the limits of the issue in this case.

Mr. KREEGER. Can Your Honor take judicial notice of these rulings if presented in brief, notwithstanding they might not have been published and distributed to the general public?

The COURT. I shall take notice as bearing on the interpretation that has been placed upon the law by this Department.

Mr. KREEGER. That is the sole—

The COURT (interrupting). And give the interpretation such weight I think under the facts and circumstances it deserves.

Mr. KREEGER. That is the only purpose for which it is offered. In that case, to save time, Your Honor, I should like to offer these other four proposed exhibits as Exhibits 4-B, C, D, E, of
129 the Government. They also relate to rulings by the Public

Contracts Division in cases other than that of Endicott Johnson Corporation.

Mr. SWARTWOOD. Same objection.

The COURT. Sustained.

Mr. KREEGER. Exception.

Mr. SWARTWOOD. I think, however, it appears that Exhibit 4-B was written, or the correspondence took place, in 1937 and, therefore, is not subject to the same objection which I previously stated. I object to this on the ground it was never promulgated by the Division—never came to the attention of the Defendant.

Mr. KREEGER. Then I understand objection is made and sustained as to each one of these Exhibits.

The COURT. Same ruling.

By Mr. KREEGER:

Q. Do you have personal knowledge of any cases before the Division at, before, or during the time when the Endicott Johnson contracts were in operation, which involved the manufacture by a contractor of raw, semifinished, or intermediate materials
130 in industries where the competitors of that contractor normally did not manufacture the same type of raw, semifinished, or intermediate materials?

Mr. SWARTWOOD. Objected to as not within the issues.

The COURT. Sustained.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. Will you state when, or approximately when, the first investigation was made under the Endicott Johnson contracts here involved?

A. It was in June 1938.

Q. The first investigation made by any inspector?

A. I beg your pardon. The first inspection was much earlier than that, and I would say probably late in 1937—the fall of 1937. I could refresh my recollection from the Investigator's report—otherwise, I don't know the exact date.

Mr. KREEGER. May I refresh the witness' recollection, Your Honor? I have something here that might do so.

By Mr. KREEGER:

Q. I have a statement here that one D. F. Hill, an Investigator of the Division, was sent out to inspect
131 the "George F. Tabernacle" Factory on April 26, 1937; that one Madison Smith inspected "George F. Tabernacle" Factory August 2, 1937; and one George H. Roller inspected the "George F. Tabernacle" Factory and "Scout" Factory on October 11 or 12, 1937.

A. Those Inspectors were at the plants in that order, and my recollection is rather exact as to the time when the last two Inspectors were there. I am rather sure your statement of the time the first Inspector was there is accurate.

Q. Which of those Inspectors, to your knowledge, are still available as witnesses?

A. Well, Mr. Roller is readily available, as he is in the East.

Q. Mr. Roller is present. Are the other two available?

A. Madison Smith is on the west coast, and I don't know where the other Investigator is. He is no longer with the Department.

Q. When did you first receive notice that the Endicott Johnson Corporation was engaged in tanning, and making leather and rubber under these contracts?

The COURT. His first recollection? That objected to!

132 Mr. KREEGER. When did the Public Contracts Division first receive notice that the Endicott Johnson Corporation was engaged in tanning leather, and making heels and soles under these contracts?

The COURT. Where is there any materiality to that, Mr. Kreeger? There is no dispute even under the pleading that they did tan their leather, and I don't care as far as I am concerned whether the Public Contracts Division ever received notice. If that operation is under the Walsh-Healey Act—

Mr. KREEGER (interrupting). That ruling is satisfactory. I wanted to rule out any possibility there might be as to the finding of laches.

The COURT. If there comes up any question that they didn't tan leather during any period, then I will give you an opportunity to go into them.

Mr. KREGER. I merely wanted to show Your Honor the Division did act diligently on its information.

133 I wish to have marked for identification, as the Government's next Exhibit, a document entitled, "Inspection Report," dated June 21, 22, 1938.

(Inspection Report, dated June 21, 22, 1938, marked "Government's Exhibit Number 5" for identification of this date.)

Now, Your Honor, it is the Government's intention to rely only on one statement appearing on page two of that report, that has a number of pages, and I would be willing to offer just that portion.

(Document handed to the Court.)

Mr. KREGER. I wish to offer, Your Honor—Would you identify this, Mr. Grogan [handed to witness]!

Mr. GROGAN. This is an Inspection Report of the Endicott Johnson Corporation in Binghamton, New York, in the performance of their contract, No. W-155-QM-8232, signed by Mary P. Hogue, Investigator of the Division of Public Contracts, and received by the Division June 24, 1938.

Mr. KREGER. I offer that in evidence, Your Honor.

134 Mr. SWARTWOOD. That is objected to as not within the issues here being tried; furthermore, it is a departmental communication, and is in no way binding on the Defendant.

The Court. I shall sustain the objection. It may be there are some parts material. Mrs. Hogue is in Court. If there is anything contained in that report you want to put in, call Mrs. Hogue, and have her testify to those facts.

Mr. KREGER. Yes, Your Honor. I intend to do that. My purpose in respect to this witness was to show it was received by the Division.

The Court. Whether it was received or not is immaterial on the issues here.

By Mr. KREGER:

Q. To your personal knowledge, Mr. Grogan, with respect to the Endicott Johnson contracts, did the question come before you, or before the Examining Division, with which you are connected, as to the coverage of the tanneries by the Walsh-Healey Act?

A. It did.

Q. Will you state what ruling was made on that question by yourself, and the Division?

135 A. We—

The Court (interrupting). Just a moment! Isn't that the very question at issue here? (To Mr. Swartwood.) Do you object to that?

Mr. SWARTWOOD. It is true that there were rulings made by the Division with respect to these particular contracts, and that is the issue before the Court at this time. I have no objection to his stating he did make the ruling, if he wishes.

The COURT. All right.

Mr. GROGAN. The Division did make the ruling that all the parts of an integrated establishment which—

The COURT (interrupting). That is a general ruling we are talking about?

Mr. KREEGER. Confine it to this case.

Mr. GROGAN. We made that ruling, Your Honor, to the Endicott Johnson Company.

The COURT. I will strike out your answer. You were giving a general ruling—and restrict your answer.

136 Mr. GROGAN. The Endicott Johnson Company was advised that the Act applied to all the parts of its integrated establishment, which were engaged in making materials or supplies that were used in the performance of the contract.

Mr. KREEGER. I should like to have marked for identification a certified copy of a letter dated February twenty-third, 1939, addressed to Mr. Charles Johnson, Endicott Johnson Corporation, and signed L. Metcalfe Walling, Administrator.

(Certified Copy of letter addressed to Mr. Charles Johnson from Mr. L. Metcalfe Walling, marked "Government's Exhibit 6" for identification of this date.)

The COURT. I just want to ask the question for my recollection. Are you the one that verified the complaint and application in this case?

Mr. GROGAN. No; I am not.

Mr. SWARTWOOD. Mr. Reilly did that.

The COURT. The ruling you already stated is inconsistent with the allegations of that complaint; is it not?

137 Mr. GROGAN. I hope it is not.

Mr. KREEGER. In what way, Your Honor?

The COURT. Because in that complaint, as I recall it, one of your allegations was that this—you had reason to believe that this was under the provisions, and that it was the purpose of that hearing to take proof so that the Department could decide whether it was under the ruling.

Mr. KREEGER. That is true, Your Honor.

The COURT. Yes; but, according to Mr. Grogan, you have made a definite ruling in advance.

Mr. KREEGER. They made definite rulings on two or three occasions, but the complaint and application—that is, the complaint in the Administrative proceeding—was intended to give a hearing

to the Defendant to show why the understanding by the Public Contracts Division was wrong.

The COURT. It is possible, if you made the complaint in accordance with the ruling—

Mr. KREEGER. We amended our complaint to allege that
138 outright. It was on that basis I renewed my motion for judgment on the pleading because instead of questioning the issue, they admitted they tanned the leather and made rubber, and we charged they are covered. I should like to offer in evidence (to the witness).—Would you identify that document I hand to you, Mr. Grogan.

Mr. GROGAN. This is a copy of a letter dated February twenty-third, 1939, from L. Metcalfe Walling, the Administrator, to Mr. Charles Johnson, of the Endicott Johnson Corporation.

By Mr. KREEGER:

Q. Is Mr. Walling the Administrator of the Public Contracts Division?

A. Administrator of the Public Contracts Division, Department of Labor.

Q. Was he Administrator February twenty-third, 1939?

A. Yes; he was.

Mr. KREEGER. I offer it in evidence.

Mr. SWARTWOOD. No objection. I would like to call attention to the fact the ruling is dated February twenty-third, 1939, which is several months after the completion of the contracts.

139 The COURT. I will receive it for what it is worth.

(Certified Copy of letter addressed to Mr. Charles Johnson from Mr. L. Metcalfe Walling, previously marked for identification received in evidence as Government's Exhibit 6 of this date.)

By Mr. KREEGER:

Q. Are you personally familiar with this letter which has been marked as Government's Exhibit 6?

A. Yes.

Q. Do you know the facts and circumstances which immediately preceded, and which took place, at the time this letter was sent?

A. I do.

Q. Will you state that to the Court?

Mr. SWARTWOOD. Well, I don't know what it was. Let me see if I can identify it?

Mr. KREEGER. That is the same one.

Mr. SWARTWOOD. Well, I object to the statement of the witness as to the circumstances under which it was written. It appears from the Exhibit that it was not through any questions

140 which were asked by Endicott Johnson Corporation for ruling in connection with this matter.

The COURT. I will sustain that.

Mr. KREEGER. Exception, Your Honor.

Mr. SWARTWOOD. The letter is in evidence, however.

By Mr. KREEGER:

Q. Are you personally familiar with the facts and circumstances which immediately followed the sending of that letter?

A. I am.

Q. Will you state those to the Court?

Mr. SWARTWOOD. Same objection.

The COURT. Same ruling.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. Did any conferences take place, at which you were present, following the sending of the letter which has been introduced as Government's Exhibit 6?

A. There were conferences with counsel for the company and Mr. Johnson. Mr. Pritchard was there, I believe, several times.

Q. Were you present at a conference held March seventeenth, 1939, at which Messrs. Johnson and Swartwood were
141 present on behalf of the Endicott Johnson Corporation?

A. I was.

Mr. SWARTWOOD. Before we get any further into this line of questioning, I would like to object to it because as I understand it, any conversations which we had after the writing of the letter of February twenty-third, or before, is immaterial to this question whether or not the operation of the tanneries and rubber mills are covered by the Act.

The COURT. Of course, any material admission made in those conversations by the defendant concerning its operations would be admissible. I am not concerned about any admission made regarding the interpretation of the law. I shall hold they are wholly immaterial. If there are any statements made by the Defendants as to the manner in which the plants were operated, or the manner in which they were owned, and so on, I will allow the conversation.

By Mr. KREEGER:

142 Q. Will you state, Mr. Grogan, what occurred at this conference of March seventeenth, 1939, with respect particularly to statements made by Mr. Johnson or Mr. Swartwood on behalf of the Endicott Johnson Corporation?

Mr. SWARTWOOD. Same objection.

The COURT. Well, yes, if the conversation is material, you should have the whole conversation, because the statements made without, perhaps, the question would be almost unintelligible.

Mr. SWARTWOOD. If you limit it to some specific statement, I have no objection.

The COURT. All right.

Mr. GROGAN. At these conferences that occurred between Mr. Swartwood, Mr. Pritchard, Mr. Johnson, the officials of the company admitted that the leather from the tanneries, some of the leather from the tanneries, at least some of the rubber soles—I think they were called “Paracord” soles—and the rubber heels, and the cut soles, as I recollect, were used in the performance of the Government contract.

143 Mr. SWARTWOOD. There isn't any dispute as to that, Your Honor.

By Mr. KREEGER:

Q. Will you state what took place, or what was stated, at the conference March seventeenth, 1939, with respect—excuse me, I would like to rephrase that statement. Will you state what was said at the conference March seventeenth, 1939, by Mr. Swartwood, the Defendant here, or Mr. Johnson, on behalf of the Endicott Johnson Corporation with respect to the award of Government contracts to shoe companies which did or did not manufacture their own leather and their own rubber for the uppers and heels and soles of the shoes?

A. It is my distinct recollection that Mr. Swartwood said that there were three large integrated companies making shoes. The companies other than Endicott were Brown and International, and that there were about six companies in all that were actively engaged in the supplying of Government shoes.

144 Mr. SWARTWOOD. Well, I have no objection to that standing in the record, but I don't see how it is material. I move to strike it out.

The COURT. I will let it stand.

By Mr. KREEGER:

Q. At this conference, was it stated whether more than half—

The COURT (interrupting). You better let him give that. You are forming a rather leading question.

By Mr. KREEGER:

Q. Will you proceed with your description?

The COURT. If there is anything you want to call his attention to, but not in the form you stated.

Mr. KREEGER. I withdraw the question.

Mr. GROGAN. May I have the question?

By Mr. KREEGER:

Q. What was said with regard to the awarding of contracts to shoe concerns that made their own rubber and leather with reference to the percentage—the portion going to the integrated as compared to the nonintegrated ones?

A. I checked on that, but don't think Mr. Swartwood told me.

145 Mr. KREEGER. I would like to have marked for identification a memorandum dated March seventeenth, 1939, from William B. Grogan to Mr. Walling, and I ask the witness to identify it?

(Memorandum dated March 17, 1939, from William B. Grogan to L. Metcalfe Walling, marked "Government's Exhibit #7," for identification of this date.)

Mr. GROGAN. This is a copy of a memorandum I made in the regular course of my duties, covering the conference on March seventeenth, 1939, between Messrs. Johnson and Swartwood, of the Endicott Johnson Company, and Mr. Walling, the Administrator of the Division of Public Contracts, and myself.

By Mr. KREEGER:

Q. Was that memorandum made on the same date—

Mr. SWARTWOOD. Is that in evidence?

Mr. KREEGER. I haven't offered to introduce it yet.

Mr. SWARTWOOD. Better introduce it before you start asking questions.

Mr. KREEGER. This is merely for identification.

146 The COURT. I understand it was made on the same date.

Mr. KREEGER. I offer it in evidence as the Government's next exhibit.

The COURT. You have the witness on the stand.

Mr. KREEGER. This is a memorandum that was made at the time of the conference. The witness doesn't recall at least one point that occurred.

The COURT. You can't prove it that way. I will state: You have your witness on the stand. I he can't recollect, it is proper to refresh his memory, but not that way.

Mr. KREEGER. I will take an exception, Your Honor.

By Mr. KREEGER:

Q. You have just told us you made this memorandum on the same date at which the conference in question was had?

A. I did make it at that time.

Q. Will you please read it to determine whether it refreshes your recollection [handing memorandum to the witness]?

Mr. SWARTWOOD. I don't know if I have any objection to
147 Mr. Grogan refreshing his recollection, but I still object to
it on the ground it is immaterial, a self-serving declaration,
made by the witness to his superior officer, never called to
the attention of this defendant.

The COURT. He is not offering it. I will allow him to read it
to see if it refreshes his recollection. If it does, of course, he
can testify (to the witness). Does that refresh your recollection?

Mr. GROGAN. As to a particular point. I would like to say
(to the Court)—May I explain?

The COURT. Well, no; there is no question before you now.
I just asked you—

Mr. GROGAN (interrupting). It does.

By Mr. KREEGER:

Q. Will you state on your recollection of that conference, as
thus refreshed, Mr. Grogan, what admission, if any, was made
by Mr. Swartwood, or Mr. Johnson, at this conference concerning
the percentage or portion of Government contracts awarded to
integrated industries, as opposed to nonintegrated?

Mr. SWARTWOOD. Just tell us in making your state-
ment—

148 The COURT (interrupting). Wouldn't that be guess on
their part? How would Endicott Johnson be in a position
to know all Government contracts? I think you had better
prove that in some other way.

Mr. KREEGER. I merely offer it to show an admission made, and
not for the facts admitted.

The COURT. For that purpose I will allow it to be made.

By Mr. KREEGER:

Q. Answer that question?

A. It does—I shall explain how it stands. I thought you asked
for definite percentages. Mr. Swartwood did concede that the
major part of production was made by the integrated establish-
ments.

Mr. SWARTWOOD. I made no statement about exact percentage or
portion.

Mr. KREEGER. No; he answered. Do I understand Government
Exhibit 7 has been rejected?

The COURT. Certainly.

Mr. KREEGER. I take an exception.

149 By Mr. KREEGER:

Q. Mr. Grogan—

Mr. KREEGER (to the stenographer). Will you kindly mark for
identification paper entitled "Contracts For Boots and Shoes,

Subject to the Provisions of the Walsh-Healey Act—September 28, 1936, to January 1, 1940.”

(Paper entitled “Contracts For Boots and Shoes Subject to the Provisions of the Walsh-Healey Act—September 28, 1936, to January 1, 1940,” marked “Government’s Exhibit #8” for identification of this date.)

By Mr. KREEGER:

Q. I hand you proposed Government Exhibit #8 and ask you to identify it.

A. This is a list of awards from September twenty-eighth, 1936, the effective date of the Walsh-Healey Act, to January 1, 1940, prepared at my direction by the Division of Public Contracts, and it accumulates information taken from the so-called PC forms, known as Notices of Award.

150 Q. Was that document prepared by you, or under your supervision and direction?

A. It was prepared under my direction.

Q. Will you state from your recollection and knowledge, based upon the studies made under your direction by this bureau in the Public Contracts Division, what percentages of Government contracts, for shoes and boots, which were awarded from the date of the formation of the Public Contracts Division until January first, 1940, were awarded to companies which manufacture their own rubber heels and soles, and tan their own leather?

Mr. SWARTWOOD. Well, now, just a minute; I object to the testimony first on the ground it appears it is to be made from a memorandum covering a period outside the period of these contracts, and runs from 1936 to January first, 1940, and, further, on the ground I don’t see how it is material to determine if the tanneries and rubber mills are under the provisions of the Walsh-Healey Act.

The COURT. I shall sustain on the ground it is immaterial.
151 I would expect the integrated industries would have a larger proportion of the contracts the same as I would expect Ford, General Motors, and so on, would have the big percentage of the contracts for cars—they are the big industries.

Mr. KREEGER. That’s right, and it is offered for that purpose, and to show that many competitors do not make their own leather and soles.

Mr. SWARTWOOD. Mr. Kreeger is trying to rebut something excluded from the scope of this hearing—there is no testimony before the Court on any of that.

The COURT. Never mind—if the case goes up on Appeal, of course, the record will be the means for that. The record will not contain remarks—

Mr. KREEGER (interrupting). I have not formally offered this memorandum as the Government's Exhibit, but would like to do so at this time.

The COURT. What is that?

Mr. KREEGER. Exhibit #8.

The COURT. Not received.

Mr. KREEGER. Exception, Your Honor. I would like to have marked for Identification a certified copy of a letter dated
152 July fifteenth, 1939, addressed to Mr. Charles F. Johnson, Jr., Endicott Johnson Corporation, signed L. Metcalfe Walling, Administrator.

Mr. SWARTWOOD. That is one of the letters written us in connection with this matter.

The COURT. Received.

(Certified copy of letter written July fifteenth, 1939, addressed to Mr. Charles F. Johnson, Jr., from Mr. L. Metcalfe Walling, Administrator, received in evidence as Government's Exhibit #9 as of this date.)

Mr. KREEGER. Are you willing to receive it in evidence, Your Honor?

By Mr. KREEGER:

Q. I show you Government's Exhibit #9, Mr. Grogan, and ask if you are familiar with that letter?

A. I am.

Q. Are you familiar with the facts and circumstances under which that letter was written?

A. Yes.

153 Q. Would you state them, please?

A. That letter—

The COURT (interrupting). I will hold it is immaterial as to the facts and circumstances. The letter speaks for itself.

Mr. KREEGER. It speaks for itself, but the circumstances under which it was written show the grounds on which the Department later took proceedings against the Defendant.

The COURT. I am not interested in that. I am not going to allow that.

Mr. KREEGER. I take an exception, Your Honor.

By Mr. KREEGER:

Q. Will you state whether the ruling made in that letter constituted a deviation or an exception—

Mr. SWARTWOOD (interrupting). That is objected to.

Mr. KREEGER. Kindly let me finish the question. Deviation or exception from the position of the Division which had been followed, to your knowledge, to that time and before?

Mr. SWARTWOOD. That is objected to on the same grounds as immaterial.

The COURT. Sustained.

Mr. KREEGER. Exception.

154 By Mr. KREEGER:

Q. As the Chief Legal Officer of the Public Contracts Division. Mr. Grogan, what information did you receive concerning whether or not the leather and the rubber used by the Endicott Johnson Corporation, in the manufacture of the shoes, came from stock piles which existed prior to the award of the Government contracts in question, or were manufactured by the corporation for the purpose of manufacturing the Government shoes?

Mr. SWARTWOOD. Same objection.

The COURT. Sustained in that form. If he has any information I will allow him to show it, but not in that form.

By Mr. KREEGER:

Q. Mr. Grogan, what information do you have as to whether or not the leather and the rubber used by the Endicott Johnson Corporation in the manufacture of the shoes came from stock piles which existed prior to the awarding of the contract?

Mr. SWARTWOOD. The same objection.

The COURT. That is the same question in a little different form—sustained.

155 By Mr. KREEGER:

Q. Mr. Grogan, do you have any personal knowledge as to whether the leather and the rubber used by the Endicott Johnson Corporation in the manufacture of these shoes existed prior to the award of the contract?

Mr. SWARTWOOD. Same objection.

The COURT. Sustained in that form (to the witness). Have you any personal knowledge regarding where the material in those shoes came from?

Mr. GROGAN. The material—

The COURT (interrupting). No—personal knowledge?

Mr. GROGAN. No.

By Mr. KREEGER:

Q. Were there any admissions or statements made to you by any official or representative of the Endicott Johnson Corporation which would indicate whether or not the stock piles—

Mr. SWARTWOOD (interrupting). That is leading, Your Honor.

156 The COURT. I will sustain—the form, if you want to ask him about any conversations, show the conversation, who was present—I will allow him to give the conversation, but I can't allow you to go after the answer.

By Mr. KREEGER:

Q. Did you have any conversation with any representatives of the Endicott Johnson Corporation concerning the source of the leather and rubber for the contracts?

A. There were several conversations in the Spring of 1939 with officials of the company, particularly Mr. Johnson and Mr. Swartwood, in which that question came up several times. Those officials—

The COURT (interrupting). I think you better give your conversation next instead of giving the conclusion of it.

Mr. GROGAN. The officials stated that—

The COURT (interrupting). Can you give which ones stated, so that—

Mr. GROGAN (interrupting). My best recollection is that it was Mr. Swartwood, stated that the volume of business which was being done on Government contracts was so great that the leather had to be tanned concurrently with the final process operations in order that the company could supply enough leather to make the shoes.

Mr. KREEGER. I wish to have marked for identification certified copy of a letter dated December fifth, 1939, addressed to Mr. Ralph J. Fogg, and signed Mary P. Hogue.

(Certified copy of letter dated December fifth, 1939, addressed to Mr. Ralph J. Fogg by Mary P. Hogue, marked "Government's Exhibit #10" for identification of this date.)

By Mr. KREEGER:

Q. I hand you this letter, Mr. Grogan, and ask you to identify it (exhibit shown to the Court prior to being handed to the witness).

Mr. SWARTWOOD. Is this Exhibit #10?

The COURT STENOGRAPHER. Yes.

Mr. SWARTWOOD. I object to it on the ground it is immaterial.

Mr. KREEGER. I haven't offered it in evidence yet.

The COURT. You want to identify it? Just let him see it [handed to the witness].

158 Mr. GROGAN. A letter from Inspector Hogue to the Chief of the Inspection Section of the Division of Public Contracts, Department of Labor.

By Mr. KREEGER:

Q. Was that letter received by the Public Contracts Division? (No audible answer.)

Mr. KREEGER. I offer it in evidence as the Government's next exhibit.

The COURT. Do you object? (to Mr. Swartwood).

Mr. SWARTWOOD. I object to it as immaterial.

The COURT. Sustained.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. Did you recommend, Mr. Grogan, as Chief Legal Officer of the Division, that an Administrative Proceeding be instituted against the Endicott Johnson Corporation?

A. I did.

Mr. SWARTWOOD. I object.

The COURT (to Mr. Swartwood). You object?

Mr. SWARTWOOD. Yes.

159 The COURT. Sustained—the answer may go out.

By Mr. KREEGER:

Q. As Chief Legal Officer of the Division, Mr. Grogan, did you believe that the employees of the Endicott Johnson Corporation engaged in tanning leather, cutting soles, and heels, and manufacturing rubber for soles and heels, in plants and departments of the Defendant corporation, Endicott Johnson, were egaged in the performace of these fifteen contracts?

Mr. SWARTWOOD. Same objection—immaterial—a question the Court has to determine.

The COURT. Sustained.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. Did you take any official action, Mr. Grogan, immediately prior to the institution of the Administrative Proceeding, in October 1939, against the Endicott Johnson Corporation?

The COURT (to Mr. Swartwood). Do you object to that?

Mr. SWARTWOOD. Yes; on the same ground—immaterial.

160 The COURT. Sustained.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. Will you state from your personal knowledge, Mr. Grogan, from your official knowledge as Chief Legal Officer of the Public Contracts Division, what information, documents, and other papers, were before the Division prior to the issuance of the Administrative Complaint in October 1939?

Mr. SWARTWOOD. Same objection—as immaterial.

The COURT. Same ruling.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. Prior to the institution of the Administrative proceedings in October 1939 was a formal demand and refusal for producing of books and records made?

A. Yes.

Mr. KREEGER. I would like to have marked for identification a document entitled, "Amended Complaint in the Matter of Endicott Johnson Corporation."

161 (Amended Complaint in the Matter of Endicott Johnson Corporation, marked "Government's Exhibit 11" for identification of this date.)

The COURT. You mean the Administrative Complaint?

Mr. KREEGER. Yes; Your Honor.

The COURT. Mr. Kreeger, isn't that almost completely set up in your complaint and application in this case?

Mr. KREEGER. It is summarized, Your Honor. However, the answer in this case embodies the answer to the Administrative complaint. I should like to offer this to complete the record.

The COURT. I will receive it, but I can't see where it is very important.

Mr. SWARTWOOD. I object to it on the ground it is immaterial.

The COURT. I will receive it.

(Amended Complaint in the Matter of Endicott Johnson Corporation, previously marked for identification, received in evidence as Government's Exhibit #11 of this date.)

162 Mr. SWARTWOOD. I don't see much difference one way or the other.

Cross-examination by Mr. SWARTWOOD:

Q. Mr. Grogan, are you familiar with the ruling which was issued by Gerard F. Reilly in the International Harvester case?

Mr. KREEGER. I object; Your Honor has excluded that ruling from the record. It has been offered and excluded.

The COURT. I am going to allow him to say "Yes."

Mr. GROGAN. Yes.

The COURT. And then, your objection.

Mr. SWARTWOOD. That is all I am going to ask him.

By Mr. SWARTWOOD:

Q. And will you state whether or not that ruling was issued before the completion of the performance of the contracts of Endicott Johnson Corporation?

Mr. KREEGER. I object, Your Honor.

The COURT. Sustained.

Mr. SWARTWOOD. Exception.

163 By Mr. SWARTWOOD:

Q. Mr. Kreeger has examined you with respect to a conversation on March seventeenth, and you refreshed your recollection from a memorandum. Did you make any memorandum of any other conversations you had with the Defendants?

A. There were several other memoranda made by me. There was also the incorporation of the substance of our conferences in one of the letters addressed—

Q. (Interrupting.) You did make them!

A. I did.

Q. Has the Division of Public Contracts ever promulgated any rulings other than the Rulings and Interpretations No. 1 and No. 2?

Mr. KREEGER. I object to that question, Your Honor, on the ground it is too indefinite. I think counsel should define what he means by "proposed."

By Mr. SWARTWOOD:

Q. Ever been proposed or promulgated, as Government functions of the Division of Contracts, other rules than Interpretations and Rulings No. 1 and No. 2?

164 A. There have been no Rulings and Interpretations used to define that document—there have been none but numbers one and two.

Q. And I think it is a fact that the Ruling No. 2 was promulgated as of September twenty-ninth, 1939? Is that a fact?

A. That's right.

Mr. SWARTWOOD. That is all.

Redirect examination by Mr. KREEGER:

Q. One question, Your Honor. Mr. Grogan, you have just stated that no Rulings and Interpretations, other than those embodied in Government Exhibit 3-A and 3-B were issued; beside those, will you state whether the Department, the Division of Public Contracts, makes specific rulings in letters covering the particular case of a contractor who has raised a question, or where such a point—

Mr. SWARTWOOD. Objected to as immaterial.

The COURT. Answer yes or no—overruled.

Mr. GROGAN. Yes.

The COURT. The answer "Yes," stands.

165 Mr. KREEGER. That is all.

The COURT. Court will be in recess for five minutes.

(Recess taken for five minutes. Case resumed after recess, same date and place.)

Mr. KREEGER. Your Honor, may I have an indication of how long you are going to sit today?

The COURT. I was hoping we could work until pretty near six.

Mr. KREEGER. Near six?

The COURT. I was hoping.

Mr. KREEGER. I was just wanting to plan my time with the witnesses. One or two may want to go home.

CLIFFORD P. GRANT, called as a witness in behalf of the Government, and being duly sworn, testified as follows:

Direct examination by Mr. KREEGER:

Q. Mr. Grant, will you state your name and your title?

A. Clifford P. Grant, Assistant Chief Examiner, of 166 the Division of Public Contracts, Department of Labor.

Q. What are your functions and duties?

A. In an assistant capacity to Mr. Grogan.

Q. Are you familiar with the official steps, documents, rulings, made in the case of the Endicott Johnson Corporation with respect to the fifteen contracts involved in this action?

A. Yes; I am.

Mr. KREEGER. I should like to have marked for identification a six-page document entitled "Leather Produced During Periods of Government Contracts."

(Six pages entitled "Leather Produced During Periods of Government Contracts" marked "Government's Exhibit Number 12" for identification of this date.)

The COURT. Is that a record of the leather produced by Endicott Johnson?

Mr. SWARTWOOD. I have no objection to it being offered.

The COURT. Prepared by Mr. Swartwood?

Mr. KREEGER. Under his direction. It was supplied by the Defendant to this witness.

Mr. SWARTWOOD. Let me just compare it. I think it is 167 all right (comparing Proposed Exhibit number 12 with a copy in his possession). I have no objection to the introduction.

The COURT. Just make a statement how you are going to use it—I will let it in. Just read it, and maybe you can stipulate.

Mr. KREEGER. This is material furnished by Mr. Johnson of the Endicott Johnson Corporation—that is Charles F. Johnson—it just says, "By Messrs. Johnson and Swartwood."

Mr. SWARTWOOD. It is material submitted by the Defendant, Endicott Johnson Corporation. I don't know who submitted it.

Mr. KREEGER. Material submitted by Endicott Johnson Corporation to Mr. Grant.

The COURT. What is it?

Mr. KREEGER. It shows figures of the amount of soles, upper leather, calfskin tannery leather, rubber soles, rubber heels, that has been produced, and the amount that has gone into Government contracts, and the amount that did not.

168 The COURT. Offered in evidence—no objection—received.
(Six pages entitled "Leather Produced During Periods of Government Contracts" previously marked for identi-

fication received in evidence as Government's Exhibit Number 12 of this date.)

By Mr. KREEGER:

Q. Were you present, Mr. Grant, at an Administrative Hearing on December thirteenth 1939, before Examiner McIlwaine, William A. McIlwaine, of the Division of Public Contracts, in the Matter of the Endicott Johnson Corporation?

A. Yes, at that time I was not Assistant Chief Examiner of the Division, and I appeared in that hearing in the capacity of Attorney on behalf of the Department of Labor.

Mr. KREEGER. I should like to have this document, "Official Report of Proceedings," marked as the Government's next Exhibit for identification.

(Official Report of Proceedings of December 13, 1939, marked "Government's Exhibit Number 13" for identification of this date.)

169 Mr. SWARTWOOD. That is the minutes of the hearing, of the hearing December thirteenth?

Mr. KREEGER. December thirteenth, 1939. Now, Your Honor, before I introduce that, I should like to say I am only introducing a few pages. There is no need to encumber the record with more than five or six pages, because most of the other material is before the Court on the pleadings. Now I would like to identify the pages to show Defendant's Counsel what pages I would like to introduce in this record, subject to exception.

Mr. SWARTWOOD. If Your Honor please—

The COURT (interrupting). In the form of admission?

Mr. KREEGER. It is the part, if Your Honor please, that relates to proceedings had before the National Labor Relations Board, at which Defendant made certain admissions, which we want to introduce for what it may be worth.

The COURT. Who gave the testimony?

Mr. KREEGER. Mr. Swartwood gave the testimony.

170 The COURT. Why not ask him here. Probably he will ask—

Mr. KREEGER (interrupting). I just offer this to save time.

Mr. SWARTWOOD. Can this go off the record, what I am about to say?

The COURT. Better keep it on the record.

Mr. SWARTWOOD. I have no objection to the Plaintiff introducing the full testimony of the hearing of December thirteenth, 1939, as an exhibit in this proceeding, and to become a part of the record therein.

The COURT. But you object to parts of it?

Mr. SWARTWOOD. Yes, sir.

By Mr. KREEGER:

Q. Mr. Grant, is this document I show you—

The COURT (interrupting). I don't understand your last question. It is the stenographer—the official stenographer's report?

Mr. SWARTWOOD. I am willing to take Mr. Kreeger's word for it.

Mr. KREEGER. So far as I know, that is what it is. It
171 hasn't been changed, and Mr. Grant recognized it as a copy
of the Official Transcript.

Mr. GRANT. That's right. A copy I had in my possession since the hearing.

The COURT. Now you are offering it all in?

Mr. KREEGER. Well, Your Honor, I don't have any objection to it all going in, but it seems to me it would be necessary only to introduce—perhaps I better offer solely pages sixteen, seventeen, eighteen, and nineteen.

The COURT. Mr. Kreeger, I am very doubtful of that being acceptable over an objection. Mr. Swartwood said he had no objection if it all goes in. I doubt the admissibility of any of it in particular, so if you will put it in, as long as Mr. Swartwood says he has no objection, I will take the whole record.

Mr. KREEGER. I have no objection.

The COURT. And you can call attention in your brief to any particular pages.

(Official Report of Proceedings of December 13, 1939, previously marked for identification, received in Evidence as Government's Exhibit Number 13 of this date.)

172 Mr. KREEGER. I would like for the record to show I am particularly interested—that the purpose of my introducing the transcript relates to the matter on page—

Mr. SWARTWOOD (interrupting). Your Honor—

Mr. KREEGER (continuing). Sixteen—

Mr. SWARTWOOD (interrupting). I think the record of counsel—I move to strike—

Mr. KREEGER (continuing). Sixteen through nineteen. (To Mr. Swartwood:) I haven't finished my statement.

Mr. SWARTWOOD (to Mr. Kreeger). Well, you are trying to refer on the record to what you would prove. You can point that out—

The COURT (interrupting). I think I will allow him to state on the record, just for convenience—(to Mr. Kreeger:) You want to call particular attention to certain pages?

Mr. KREEGER. Yes, Your Honor. I would not ordinarily introduce the entire transcript because I think there are particularly relevant only pages sixteen, seventeen, eighteen, nineteen, and the pages sixty-three, sixty-four—that is all, Your Honor.

173 Mr. SWARTWOOD. I object to the reference to any portion of the testimony at this time. It seems to me as though the whole record of that proceeding should go in.

The COURT. It is in.

Mr. SWARTWOOD. Very well.

The COURT. Objection overruled. The whole record is in.

Mr. KREEGER (to Mr. Swartwood). Your witness.

Mr. SWARTWOOD. I have no questions.

GEORGE H. ROLLER, called as a witness in behalf of the Government, and being duly sworn, testified as follows:

Direct examination by Mr. KREEGER:

Q. Will you state your name and title, please?

A. George H. Roller. I am one of the Investigators of the Division of Public Contracts.

Q. Since what date have you been an Investigator?

A. I began work near the end of September 1937.

Q. As an Investigator, what are your duties?

A. I call upon various companies who are performing Government contracts, and inspect them as to their compliance with the provisions of the Walsh-Healey Act.

Q. When were you first assigned to make an inspection of the books and records of the Endicott Johnson Corporation?

A. Well, that was—[referring to paper]—I see I called on this company October eleventh, 1937. I must have received the assignment a couple days before that—as a matter of fact, that was the first company I inspected after I went into the field.

Q. What offices or plants of the Endicott Johnson Corporation did you inspect? Let me rephrase the question. What books and records did you inspect of the Endicott Johnson Corporation, particularly covering the employees—in what plants and factories?

A. The "George F. Tabernacle" Factory, I believe it is called, in Binghamton; also known as the "Tabernacle" Factory; also, the "Scout" Factory in Johnson City.

Q. How many contracts were you making the inspection in respect to?

175 A. Two, I believe.

Q. Did you know, or did you discover while inspecting the books and records of Endicott Johnson—at the plants you specified—that the corporation operated any tanneries?

A. I have no recollection at all of any mention of tanneries. I didn't see any tanneries. My notice of award or assignment simply mentioned—

The COURT (interrupting). No.

Mr. SWARTWOOD. No. The last part I move to strike out.

The COURT. It may go out.

By Mr. KREEGER:

Q. Did you know or learn while you were at the Endicott Johnson premises that they were performing any function other than the final fabrication of shoes under the two contracts?

A. My best recollection is that nothing was mentioned, and nothing was brought to my attention concerning anything except the final fabrication of the shoes.

Q. In your experience as an Investigator, have you come across instances in which the contractor performed other processes, and other steps, other than the final fabrication of the products?

176 A. Yes.

Mr. SWARTWOOD. I object to that as immaterial, and move to strike out the answer.

The COURT. Sustained. The answer may go out.

Mr. KREEGER. Exception, Your Honor.

By Mr. KREEGER:

Q. As an Investigator for the Public Contracts Division do you understand that your duties are to inspect books and records for plants other than those specified in your notice of award?

Mr. SWARTWOOD. Same objection.

The COURT. Sustained.

Mr. KREEGER. Exception.

By Mr. KREEGER:

Q. What has been your conduct with respect to the inspection of books and records of a plant not mentioned in the notice of award which you receive?

Mr. SWARTWOOD. That is objected to on the same ground. It is immaterial and not binding on us in any way.

The COURT. Sustained.

Mr. SWARTWOOD. What is practiced—

Mr. KREEGER (interrupting). Exception. That is all.

177 Cross-examination by Mr. SWARTWOOD:

Q. Can you state which contracts you were making an inspection upon for the "George F. Tabernacle" and "Scout" Factories when you were there in October 1937.

A. I would have to see my report in order to refresh my recollection on that.

Q. They were existing contracts then being performed, or contracts already been performed?

A. I think one of the contracts was one hundred percent complete. As to the other, I do not recall, without referring to the report I sent in.

Q. Could you refresh your recollection as to whether or not the contracts you were then inspecting had been fully performed at the time you made the inspection?

Mr. KREEGER. I object to that as wholly immaterial when the inspection was made under the Walsh-Healey Act as to whether the contract was in effect.

The COURT. I will sustain in respect only to those.

Mr. SWARTWOOD. I would like to state for the benefit of
178 the Court, in this connection, that it is our contention that at no time during the period of the performance of these contracts did anyone connected with the Division of Public Contracts ever attempt or intimate that there was anything involved with respect to the Walsh-Healey Act, except the footwear factories, where final shoes were fabricated, and to show there was laches on the part of the Department in calling those matters to the Defendant's attention.

Mr. KREEGER. I object to the testimony of Mr. Swartwood.

The COURT. I will adhere to my ruling.

Mr. SWARTWOOD. Exception.

By Mr. SWARTWOOD:

Q. Now, Mr. Roller, you stated at the time you made the inspection on October eleventh, 1937, you did not know the Endicott Johnson Corporation was manufacturing leather or rubber soles and heels? Is that correct?

A. Yes; that is my recollection.

Q. Did you make any inquiries of anybody connected
179 with the Endicott Johnson Corporation as to whether they were or were not making leather or rubber soles and heels?

A. I don't think the question was discussed at all. As a matter of fact, I went to the "Tabernacle" Factory and discovered the records were not there, and was sent to Johnson City.

Mr. SWARTWOOD. I move to strike out the answer. Answer yes or no. Did you or did you not ask any question of anybody connected with the Endicott Johnson Corporation whether they were manufacturing leather and rubber soles and heels? Answer yes or no.

Mr. ROLLER. I have no recollection that was discussed at all. If it had been discussed I would have raised the question with my office as to what to do with it.

By Mr. SWARTWOOD:

Q. Do you know of a Bureau in the Department of Labor known as the Bureau of Labor Statistics?

A. Yes, of course.

Q. Do you know whether or not Endicott Johnson Corporation,
180 prior to October eleventh, 1937, had rendered reports to the Bureau of Labor Statistics showing they manufactured leather and rubber soles and heels, and leather and rubber—

Mr. KREEGER (interrupting). I object—it is not relevant. The reports rendered by Endicott Johnson to other Government agencies are not connected up.

Mr. SWARTWOOD. I just asked if he knows.

The COURT. He can answer if he knows.

Mr. ROLLER. I have no knowledge of reports made by the Endicott Johnson Corporation to any other Government Agency.

By Mr. SWARTWOOD:

Q. Do you know that the Bureau of Labor Statistics collect that information from shoe manufacturers?

Mr. KREEGER. I object to that.

The COURT. Just answer yes or no.

Mr. ROLLER. I know the Bureau of Labor Statistics collects reports from many companies along many lines, but with particular regard to this, I have no knowledge whatever.

By Mr. SWARTWOOD:

Q. Do you know whether or not if your Department, the
181 Division of Public Contracts, had made a request of the Bureau of Labor Statistics, whether you could have found out before the inspection we were making—

Mr. KREEGER. I object. It is purely hypothetical.

The COURT. Sustained.

Mr. SWARTWOOD. That is all.

Redirect examination by Mr. KREEGER:

Q. One question—Mr. Roller—was it any part of your duties, as Investigator, to inquire of any other Government Agency concerning the scope of operations of the corporations whose books and records you were sent to inspect?

A. No.

Mr. KREEGER. That is all.

Re-cross-examination by Mr. SWARTWOOD:

Q. You went up to Endicott to make inspection of our factory and plants, which you were told were engaged in the performance of these contracts?

A. I did not go to Endicott.

182 Q. Did you go to Johnson City for that purpose?

A. Yes.

Redirect examination by Mr. KREEGER:

Q. Mr. Roller, you are familiar with the questions—why did you go to Johnson City to make an inspection?

Mr. SWARTWOOD. That is objected to.

The COURT. I sustain that. He was there, and made an inspection.

By Mr. KREEGER:

Q. Who directed you to go to Johnson City to make the inspection?

A. The foreman at the "Tabernacle" said I would have to go over there to get the records.

Mr. KREEGER. That is all.

Mrs. MARY P. HOGUE, called as a witness in behalf of the Government, and being duly sworn, testified as follows:

Direct examination by Mr. KREEGER:

Q. Will you kindly state your name and your position?
183 A. Mary P. Hogue, Investigator, Division of Public Contracts, Department of Labor.

Q. Will you please state what your duties and functions are as an Investigator in the Public Contracts Division?

A. My duties are to visit plants; look over pay rolls; check original records of time; interview employees; and make reports from time to time to the proper people when the check is a long one.

Q. When were you assigned to make any investigation under the shoe or boot contracts of the Endicott Johnson Corporation?

A. Just prior to June 1938.

Q. When did you first call at the premises of the Endicott Johnson Corporation?

A. On or about June twentieth, 1938—as I recall.

Q. How long did the first inspection last? How many days?

A. I was there the first time, perhaps two or three days, and I was called off to await a ruling on deductions.

Q. Will you state what books and records you inspected?

The COURT. Well, now, I am not interested in that,
184 only as it bears on the operations. I am not going into any pay rolls; not going into any time cards; nor going into any inspection regarding the factory as to sanitary or social set-ups; or anything like that.

Mr. KREEGER. I realize that, Your Honor. I am going to prove by this witness, or attempt to prove, that the witness herself visited the tanneries and rubber factories, and she will testify as to what she saw.

The COURT. Then refer to the factories instead of the books.

Mr. KREEGER. My purpose in asking the question about the books is to show this is the first agent of the Division that discovered Endicott Johnson was performing any process other than the final one.

The COURT. That is not the way of asking the question.

Mr. KREEGER. Repeat the question.

(The stenographer repeated the question as follows: "Will you state what books and records you inspected?")

185 Mr. SWARTWOOD. Objected to as immaterial.

The COURT. Sustained.

By Mr. KREEGER:

Q. Will you state what knowledge you have, based on your investigations and visits to the plants of the Endicott Johnson Corporation, concerning the manufacture by them of leather or rubber or counters or cartons for shoes, under the Government contracts.

The COURT. Well, that is conceded.

Mr. KREEGER. No; I would like the witness to state her knowledge about what went on in those plants, Your Honor.

The COURT. If you are going to, in view of what I have said, to try by indirection to get into something I have stated about six or seven times you can't have, I warn you that it will be more serious than just asking questions and getting rulings on them.

Mr. KREEGER. Well, Your Honor—

The COURT (interrupting). Here you have got a concession that the leather—that the soles, and so on—that was used in those shoes, were made in their tanneries.

186 Mr. KREEGER. But we have further questions to settle.

The COURT. All right—go ahead.

By Mr. KREEGER:

Q. Mrs. Hogue, based on your visits to the premises of Endicott Johnson Corporation, will you state what you know, what you have found out from those visits personally, with respect to whether or not the leather and the rubber came from stock piles which existed prior to this award?

Mr. SWARTWOOD. Objection.

The COURT. I will sustain your objection on the ground it is leading.

Mr. SWARTWOOD. Leading and states a conclusion.

By Mr. KREEGER:

Q. Will you state please, Mrs. Hogue, what you discovered with respect to the source of the leather and rubber which went into the Government shoes under the fifteen contracts here in question?

Mr. SWARTWOOD. Same objection.

The COURT. Overruled.

187 Mr. SWARTWOOD. Exception.

Mr. KREEGER. Repeat the question.

(The stenographer repeated the question as follows: "Will you state please, Mrs. Hogue, what you discovered with respect to the source of the leather and rubber which went into the Government shoes under the fifteen contracts here in question?")

The COURT. Mrs. Hogue, designate in testifying what factory you are testifying about so we can get that.

Mrs. HOGUE. Well, I talked to Mr. Clark, the superintendent of the tanneries first, and to the purchaser of raw materials, who said they had on hand enough Government leather to start a contract.

The COURT. Which one said—if you can give that?

Mrs. HOGUE. Mr. Clark said they had on hand usually the leather they would start the contract with, but that it would be fair to take—to start taking the time on the tanneries at this award date because they would be in process at that time.

188 The COURT. That was a conversation you had at your first visit, or second?

Mrs. HOGUE. Some time in November.

The COURT. It wasn't—

Mrs. HOGUE (interrupting). When I was sent back.

The COURT. That wasn't the first visit?

Mrs. HOGUE. I didn't talk with them then.

Mr. KREEGER. I should like to have marked for identification certified copy of a report received November twenty-eighth, 1938, signed Mary P. Hogue, Investigator.

(Certified Copy of Report, received November twenty-eighth, 1938, signed Mary P. Hogue, Investigator, marked "Government's Exhibit Number 14" for identification of this date.)

By Mr. KREEGER:

Q. I show you this document, Mrs. Hogue, and ask you to identify it [handed to Witness and examined by her].

The COURT. Just identify it, Mrs. Hogue—that is, if you can—that it is your report at such a time.

189 Mrs. HOGUE. This is a report made—I don't find the date on it—on the various contracts, and the date of state of production—

Mr. SWARTWOOD (interrupting). Don't tell what is in it.

Mrs. HOGUE. A report to Mr. Fogg.

Mr. SWARTWOOD. To the Department?

Mrs. HOGUE. To the department on eleven contracts, for a quarter million dollars.

Mr. KREEGER. I wish to offer this in evidence.

Mr. SWARTWOOD. I, of course, object on the ground it is immaterial.

The COURT. Sustained. Mrs. Hogue is on the stand. If she needs the report to refresh her recollection, I will, of course, allow her to read it.

Mr. KREEGER. I would like an exception.

The COURT. You may offer it.

Mr. KREEGER. I offer it.

Mr. SWARTWOOD. I object on the ground it is immaterial, and not the best evidence.

The COURT. Sustained.

Mr. KREEGER. I take exception.

By Mr. KREEGER:

Q. During your second visit to the premises—when did the
190 the second visit to the premises of the Endicott Johnson Corporation take place?

A. On or about November eleventh, as I recall.

The COURT. Mrs. Hogue, please speak a little louder.

Mrs. HOGUE. On or about November eleventh, as I recall.

By Mr. KREEGER:

Q. Did you visit the tanneries of the Endicott Johnson Corporation?

A. I did.

Q. Did you go through the tanneries?

A. I did.

Q. What did you see or discover with respect to the manufacture of leather for Government shoes?

A. It was represented by Mr. Schenck.

Q. Who was Mr. Schenck?

A. He is one of the Superintendents of—

The COURT (interrupting). Mrs. Hogue—

Mrs. HOGUE (continuing). He is one of the Superintendents of one of the tanneries.

The COURT. So I won't misunderstand—you said he represented; you mean he said something; or is the foreman?

191 Mrs. HOGUE. He said that the leather—the cream of the leather from 1937 through 1938 had been used in the contracts.

Mr. SWARTWOOD. I don't see how that is material. I move to strike it out.

The COURT. I will leave it stand.

Mr. SWARTWOOD. Exception.

By Mr. KREEGER:

Q. Did you go through the Calf Skin Tanneries in November
1938?

A. I did.

Q. Who accompanied you?

A. The foreman or superintendent of that particular tannery.

Q. You remember his name?

A. No.

The COURT. Could you give his name by referring to your report?

Mrs. HOGUE. Yes. I can give his name; also the name of the purchaser of raw materials. Mr. Neally was the one whom I talked to. Mr. Schenck is the Superintendent of the Calf Skin

Tannery; Mr. Dennis is the Superintendent of the leather tannery.

192 Mr. SWARTWOOD. Not responsive to the question.

The COURT. So there will be no confusion, Mrs. Hogue, you testified a few minutes ago to a conversation. Now, was that with Mr. Schenck?

Mrs. HOGUE. The conversation I talked about—I said with the Superintendent—Mr. Clark, and the Purchaser of Raw Materials, that is Mr. Neally. I couldn't remember the name at the time.

The COURT. Those—the persons you talked with, that you had the conversations with, that you already related?

Mrs. HOGUE. That is right.

The COURT. All right.

By Mr. KREEDER:

Q. What statements were made to you by Mr. Schenck in your visit through the Calf Skin Tanneries with respect to the use of the hides at the tanneries for Government contracts?

The COURT. If any.

By Mr. KREEDER:

Q. If any?

A. The hides were processed for commercial use and
193 the Government. They had no way of knowing which was going to be Government hides until they made the first selection along the line—came along to the "Blue." There is the first selection. They specify it will or will not be allowed to go into the contract. Further along they might be rejected. That is where the first selection is made.

Q. What is done with the hides after they are first selected?

A. They put on a stamp.

Mr. SWARTWOOD. Who do you mean by "they"?

Mrs. HOGUE. At this particular division the hide was stamped.

Mr. SWARTWOOD. By whom?

Mrs. HOGUE. By the Inspector.

Mr. SWARTWOOD. What Inspector?

Mrs. HOGUE. You mean, was he a Government Inspector or a Company—

Mr. SWARTWOOD (interrupting). Or an Endicott Johnson Inspector?

Mrs. HOGUE. He was inspecting them for the Government. I don't know if he was a Government Inspector or not, but that was my impression.

194 By Mr. KREEDER:

Q. How were these hides stamped, that is, with what form of stamp?

A. I do not know the stamp at all.

Q. Would this refresh your recollection, if I asked you to read the fourth paragraph? [Handing paper to the Witness.]

A. The contract number was put on in the Sorting Department.

Mr. SWARTWOOD. What was that?

Mrs. HOGUE. In the Sorting Department.

By Mr. KREEGER:

Q. What was put on?

A. The contract number.

Q. Be a little more specific, what do you mean by contract number?

A. I do not have the stamp. I didn't go through at the stamping. Those were his words.

Q. Did you understand what he meant by the contract number?

The COURT. We don't want what she understood. Of course, she will have what he said, but not what she understood.

195 By Mr. KREEGER:

Q. Did he say anything with respect to the contract number to show if it referred to the Government contract or some other contract?

A. No, sir. The good hides—they had tanned the leather for commercial work, and the more perfect was going into the Government contract.

Mr. SWARTWOOD. I object to that line. Unless she can give the wording of the conversation she had—we don't know if that is an impression, or what was said.

The COURT. I understand she is testifying as to the conversation. [To the witness.] Are you not?

Mrs. HOGUE. Yes.

Mr. SWARTWOOD. Who said it? Let's find that out!

Mrs. HOGUE. There was only one person I talked to in going through the plant, and that was the foreman of the Calf Skin Tanneries.

Mr. KREEGER. Let me finish my testimony, Mr. Swartwood.

The COURT (to the witness). You have already given his name?

Mrs. HOGUE. I have.

Mr. KREEGER. Mr. Schenck.

196 By Mr. KREEGER:

Q. Did you go through the Upper Leather Tannery during this period?

A. Yes.

Q. Anyone accompany you?

A. Mr. Dennis.

The COURT. I didn't get that.

Mrs. HOGUE. Mr. Dennis.

The COURT. Dennis?

Mrs. HOGUE. Mr. Dennis.

By Mr. KREEGER:

Q. Who was Mr. Dennis? What was his position?

A. Superintendent of that particular plant.

Q. Did Mr. Dennis make any statements to you with respect to the use of the hides in the Upper Leather Tannery?

A. Finished the same as the other.

The COURT. That will have to go out.

By Mr. KREEGER:

Q. Be more specific.

A. They were using the leather for the Government shoes—a certain part of it.

197. Q. Could you characterize the part they were using—whether it was poor or good?

A. The cream of the leather—I already—

Mr. SWARTWOOD (interrupting). I move to strike out the answer. I object to the question as leading.

The COURT. I will have to sustain because of the form of the question. I am willing Mrs. Hogue state what was said to her recollection but not ask her to characterize.

Mr. KREEGER. Your Honor is perfectly right. I withdraw my question.

By Mr. KREEGER:

Q. Did Mr. Dennis make a statement to you about the quality of the leather going into—

Mr. SWARTWOOD (interrupting). I would like to object to that as leading.

The COURT. I understand it is asked—you better let her give her recollection and you can refresh her recollection. I will let her have this.

Mr. SWARTWOOD. Exception.

198

By Mr. KREEGER:

Q. Will you answer the question?

A. The best of leather.

Q. In proposed Government Exhibit number 14, I show you these three pages. Could you identify them?

Mr. SWARTWOOD. That is objected to as already having been excluded.

The COURT. Let her state what they are.

Mrs. HOGUE. According to the contract number, and our "PC" number, the award date is given—

The COURT (interrupting). Not any of the contents. Just what the paper is?

By Mr. KREEGER:

Q. Just summarize?

A. It is just a summary of the contracts, and what happened at the plant.

Q. What contracts?

A. Contracts I have given.

Mr. KREEGER. I renew my offer of the document in evidence, as it explains the testimony of the witness, and shows a report made contemporaneously with her testimony?

The COURT. Objection sustained.

199 Mr. SWARTWOOD. I object to it as immaterial, and not binding on the Defendant.

The COURT. Sustained.

Mr. KREEGER. Exception, Your Honor.

By Mr. KREEGER:

Q. Mrs. Hogue, were you present at a conference with Mr. Swartwood, the Defendant, and Mr. Charles Johnson, an officer of the Endicott Johnson Corporation, on or about February sixteenth, 1939.

A. Mr. Johnson and with Mr. Swartwood?

Q. Mr. Charles Johnson and Mr. H. A. Swartwood?

The COURT. Anyone else present?

Mr. KREEGER. And Mr. W. E. Stevenson.

Mrs. HOGUE. No.

Mr. SWARTWOOD. The answer is No?

Mrs. HOGUE. No.

Mr. KREEGER. You were not present. I would like marked for identification letter dated February sixteenth, 1939, signed W. E. Stevenson and Mary P. Hogue, addressed to Mr. Ralph J.

Fogg.

200 (Letter dated February Sixteenth, 1939, signed by W. E. Stevenson and Mary P. Hogue, addressed to Mr. Ralph J. Fogg, marked "Government's Exhibit Number 15" for identification of this date.)

By Mr. KREEGER:

Q. Mrs. Hogue, I ask you to look at the exhibit, and see if it refreshes your recollection, and whether you can identify that exhibit?

A. I can identify it. I typed it.

Q. You typed it? Did you sign it?

A. I did.

Q. Was it made on the date that appears at the top?

A. It was dated the day it was written.

Q. And what was done after you typed and signed it?

A. It was sent to Mr. Fogg.

Q. Is your recollection refreshed with respect to statements made—

Mr. SWARTWOOD (interrupting). The witness—if that covers a conference February sixteenth, the witness has already testified she was not present.

By Mr. KREEGER:

201 Q. Does this exhibit refresh your recollection with respect to statements made in that report?

The COURT. I can't allow you to put it in that form.

By Mr. KREEGER:

Q. Do you remember the facts and circumstances attending your typing that letter?

Mr. SWARTWOOD. That is objected to.

The COURT. Mrs. Hogue, does that letter refresh your recollection whether or not you attended—

Mrs. HOGUE (interrupting). I was not at the conference.

Mr. SWARTWOOD. Has that been offered in evidence?

The COURT. No.

Mr. KREEGER. No; not yet.

By Mr. KREEGER:

Q. Will you explain the reason for your signing that, Mrs. Hogue?

The COURT. No.

Mr. SWARTWOOD. That is objected to.

By Mr. KREEGER:

202 Q. Does this exhibit refresh your recollection relative to any statement made therein?

Mr. SWARTWOOD. That is objected to on the same grounds.

The COURT. Sustained.

Mr. KREEGER. I think, Your Honor, I am entitled to refresh the witness' recollection.

The COURT. I am perfectly willing you refresh her recollection in any proper way, but not in the way you are asking here.

By Mr. KREEGER:

Q. Mrs. Hogue, on or about February sixteenth, 1939, did you have any discussion with Mr. William E. Stevenson concerning the question of the rubber plants and tanneries under the Endicott Johnson Corporation?

Mr. SWARTWOOD. I have no objection to her answering "yes" or "no."

The COURT (to the witness). Just answer "yes" or "no."

Mrs. HOGUE. Did I have a conversation? Yes.

By Mr. KREEGER:

Q. Will you state the subject matter?

Mr. SWARTWOOD. Objected to as hearsay.

Mr. KREEGER. I am asking her to state something—

203 The COURT (interrupting). Just a minute. [To the Witness:] Were the Defendants present, Mr. Swartwood, or Mr. Johnson?

Mrs. HOGUE. No; I stated I was not present at the conference.

The COURT. Who is Stevenson?

Mrs. HOGUE. Another Investigator assigned to assist me.

The COURT. Objection sustained.

By Mr. KREEGER:

Q. During your inspection of the premises, or your visits to the premises of the Endicott Johnson Corporation, Mrs. Hogue, did you see Government Inspectors on the premises?

A. Yes.

Q. Will you state what they were doing?

The COURT. Well now, take first, Mrs. Hogue, the time, and the facts you saw.

Mrs. HOGUE. He said shoes, and they were in the "Tabernacle" Factory.

The COURT. Was that at the time of your first or second visit?

Mrs. HOGUE. At the first visit—June 1938.

By Mr. KREEGER:

204 Q. What were the Inspectors doing at the shoe factory?

The COURT. Mr. Kreeger, there is no issue here with regard to the inspection, or anything, of the "Tabernacle" Factory.

Mr. KREEGER. I would like to show it is consistent with every other plant under consideration to show that what went on at the tanneries and the rubber mill is precisely the same in respect to inspections.

The COURT. I will let her testify as to any work, the inspectors she saw in the tanneries or rubber mills, but it seems to me wholly immaterial what she saw or did in the factories that were designated in the contracts, because there is no issue before me regarding those facts.

Mr. KREEGER. That is true, but it did furnish a basis for our contention that the facts relating to these plants are the same as in the shoe factories.

The COURT. I think I will have to be against you on that Limit it down to the other factories.

By Mr. KREEGER:

205 Q. I have here document already marked as "Exhibit 10" for identification. Can you recognize or identify that document?

A. Yes; it was a letter—report addressed to Mr. Fogg from me.

The COURT. To Mr. who?

Mrs. HOGUE. Mr. Fogg.

The COURT. Who is Mr. Fogg?

Mrs. HOGUE. Chief of Inspectors.

By Mr. KREEGER:

Q. Who prepared that letter?

A. I did.

Q. You sent it to Mr. Fogg?

A. I did.

Q. Do you remember the facts and circumstances surrounding the preparation of this letter?

Mr. SWARTWOOD. That is objected to on the same grounds as before.

The COURT. Sustained.

Mr. SWARTWOOD. That was sustained, Your Honor?

The COURT. Yes.

By Mr. KREEGER:

206 Q. Do you remember whether in or during your visits to the tanneries the hides were stamped by the Government Inspectors?

Mr. SWARTWOOD. Well, I object to the part of the question as leading.

The COURT. Sustained as leading. Mr. Kreeger, you would get a lot more information if you would conform a little more closely to the simple rules of evidence.

Mr. KREEGER. Your Honor, I am doing my best to do so to present the full facts to Your Honor without taking your time. I could take it a lot more slowly, and get the same result, but take more of your time.

By Mr. KREEGER:

Q. When you visited the tanneries, as you testified you did, Mrs. Hogue, at the Endicott Johnson premises, you saw Government Inspectors stamping the hides. Now, will you please give further—

Mr. SWARTWOOD. I object to the form.

Mr. KREEGER. She has already testified as to that.

The COURT. Sustain the objection.

207

By Mr. KREEGER:

Q. Did you see Government Inspectors stamping hides at the tanneries you visited?

Mr. SWARTWOOD. Same objection.

The COURT. Sustained. I am perfectly willing you ask her to tell what she saw the Government Inspectors doing—designating the different factories.

By Mr. KREEGER:

Q. You have already testified, Mrs. Hogue, you visited the tanneries. What did you see the Government Inspectors doing at the tanneries with respect to the hides?

The COURT. All right.

Mr. SWARTWOOD. Just a moment, I object to that question on the ground the witness testified she did not know whether the Inspectors she saw there were Government Inspectors.

The COURT (to the witness). What did you see anyone doing in the tanneries with reference to stamping, Mrs. Hogue?

Mrs. HOGUE. According to quality, they were making first selection for Government use.

208 The COURT. You don't know the ones, or do you know whether—

Mrs. HOGUE (interrupting). I did not talk to the man. I talked mostly to the Superintendent.

The COURT. You don't know if they were Government Employees or employees of Endicott Johnson working on it?

By Mr. KREEGER:

Q. Will you read this, Mrs. Hogue, and see if it refreshes your recollection as to the nature of the stamp being made on the hides [handing report to the witness]? Can you state your recollection of what type of stamp was made on the hides at the time?

A. A Government stamp on those selected for Government use.

The COURT. Just describe what you mean by Government stamp, that is, a stamp to certain leathers?

Mrs. HOGUE. "Gov't" most of them have been stamped. Others "GC" for Government Contract. Just a way of designating.

The COURT. Like a meat stamp?

209 Mrs. HOGUE. Sorted as to quality, I understand.

By Mr. KREEGER:

Q. A Government stamp, you said?

A. Government stamp.

Mr. KREEGER. I would like to offer in evidence—I don't know if it was done before—

The COURT (interrupting). What is it?

Mr. KREEGER. Government Exhibit Number 10. A report from Mrs. Hogue to Mr. Fogg.

Mr. SWARTWOOD. It was objected to and sustained.

The COURT. I will sustain again.

Mr. KREEGER. Exhibit Number 10—Exception, Your Honor.
Your witness, Mr. Swartwood.

Cross-examination by Mr. SWARTWOOD:

Q. Now, Mrs. Hogue, when you came to Endicott about June twentieth, did you make any inquiries at that time about the tanneries and rubber mills?

A. Yes; I did.

Q. Did you make them of me?

A. I did not.

210 Q. Who did you have your conversations with?

A. With Mr. Sherwood, at that time.

Q. And at that time—

The COURT (interrupting). For my information, who was Mr. Sherwood?

Mrs. HOGUE. In charge of pay rolls at Johnson City.

By Mr. SWARTWOOD:

Q. At the time you talked to Mr. Sherwood, the Johnson City Paymaster, in June 1938 had you visited the tanneries?

A. I had not.

Q. How did you learn we had tanneries in 1938?

A. I had been to your office. The tanneries were all over the hill.

Q. Did you ask me where the tanneries were? How did you find out?

A. They were pointed out to me by Mr. Sherwood.

Q. Did Mr. Sherwood bring you to my office?

A. He did not.

Q. How did he point them out at the time?

A. While waiting for Mr. Sherwood, and, I believe, Mr. Rials, who were called in about the books they were keeping in Binghamton.

211 Q. This was in Johnson City?

A. This was not Johnson City. This was in your office—you remember—when we had the conference about the records kept by the foremen.

Q. Was that in June?

A. In June.

Q. You first learned we had tanneries in June 1938 in my office?

Mr. KREEGER. I object to that. She already testified it was not in Binghamton.

Mr. SWARTWOOD. She just testified now—

Mr. KREEGER (interrupting). She said it was outside your office.

The COURT. I don't understand you.

By Mr. SWARTWOOD:

Q. Were Mr. Sherwood and Mr. Riale in my office at the time you discovered we had tanneries, in June 1938?

A. They had been called in your office; they had been in Endicott; but Mr. Sherwood took me back into town, from your office, and that was the time he was pointing out the various names of the plants and the plants belonging to the firm.

Q. You asked about the tanneries at that time?

212 A. Yes.

Q. And that was the reason he pointed them out to you?

Mr. KREEGER. Your Honor, I object to the entire line of questioning.

The COURT. I will sustain the last question—the objection to the last question.

By Mr. SWARTWOOD:

Q. Mr. Sherwood pointed out the tanneries in response to questions you asked him?

Mr. KREEGER. I object to that, Your Honor, on the ground it is perfectly immaterial who first brought the matter up.

The COURT. Sustained on the ground it is immaterial.

By Mr. SWARTWOOD:

Q. If you learned of the tanneries in June 1938, Mrs. Hogue, I understood your testimony to be you did not visit the tanneries until November eleventh, 1938?

A. That is right.

Q. On the first visit you made to the tanneries, on November eleventh, 1938, who did you see?

A. I saw Mr. Ralph Clark first, and talked to Mr. Nealey, the Purchasing Agent, first, who introduced me to Mr. Schenck and Mr. Dennis.

213 Q. Then as a result—

The COURT (interrupting). Do I understand, Mrs. Hogue, from Mr. Clark you made one report? To refresh your recollection, you have a perfect right to look at it.

Mrs. HOGUE. Thank you.

By Mr. SWARTWOOD:

Q. As a result of the discussion you had with Mr. Clark and Mr. Nealey, you went through the Calf Skin Tannery with Mr. Schenck? Is that correct?

A. The Superintendent of that mill.

Q. Was that on November eleventh, 1938?

A. I don't remember the exact date.

Q. Was it about that time?

A. About that time.

Q. When Mr. Schenck took you through the tannery, you say you saw Inspectors there marking the hides for Government contracts? Is that correct?

A. That's right.

Q. And, as I understood you, you are unable to state whether or not those men who were marking the hides at this "Blue" process you described, were Government Inspectors or
214 Endicott Johnson Inspectors?

A. That's right.

Q. You do not know?

A. I was introduced to them.

Q. Did you talk to any of them—any of these Inspectors?

A. Yes; I talked to them about the way they sorted according to the sizes, the thickness—this is no way of selection that is ultimately used, it is a first selection they make there.

Q. And what sort of a stamp did they put on these hides, Mrs. Hogue, at this point where they came out of the "Blue"?

A. I can't describe the stamp.

Q. What did you say?

A. I can't describe the stamp.

Q. Was it a rubber stamp?

A. As I remember, it was a "Blue" stamp. I am not accurate about that.

Q. Did you see these hides that just came out of the "Blue"? Could you describe whether they were wet or dry?

215 The COURT. I will have to ask what you and Mrs. Hogue mean by "coming out of the 'Blue'".

Mr. SWARTWOOD. "Blue" is a fluid or liquid in the tanning process which is a blue color, and at the time they take the hides out of there, that is where Mrs. Hogue saw them.

The COURT. All right.

By Mr. SWARTWOOD:

Q. This step called "coming out of the 'Blue'"—were the hides wet or dry? Do you remember?

A. I do not.

Q. And you don't remember whether it was a rubber stamp or not, but you think it was blue?

A. That is right.

Q. Did I understand you to say that when this mark was put on at the "blue process," it contained the Government contract number?

A. My understanding was it was a contract number that they used, but not the contract number we knew in the War Department.

Q. But you think they put a number of some kind on it at this point known as the "Blue Process"; is that correct?

A. That is right.

216 Q. Did Mr. Schenck tell you there was a further sorting of the hides after this "Blue Process"?

A. Yes.

Q. Did he state whether or not any marking was put on the hides at that point in the sorting department after the "Blue Process"?

A. He said further selections were made, but I don't remember whether any stamping was made.

Q. No further marking that you know of?

A. Not that I remember.

Q. Did you visit the Upper Leather Tanneries on the same date you visited the Calf Skin Tanneries with Mr. Schenck?

A. Either on that day or the next. I can't be certain.

Q. Right around November eleventh, 1938?

Mr. KREEGER. If I can refresh the witness' recollection—this exhibit was not received—but used to refresh the recollection, it shows November seventeenth, 1938.

Mr. SWARTWOOD. I am not asking to refresh—

The Court (interrupting). It is not material.

By Mr. SWARTWOOD:

217 Q. Some time in November, 1938?

A. That's right.

Q. And at what point in the Upper Leather Tanneries did you see them—see Inspectors marking the leather for Government contracts?

A. I don't remember that I did.

Q. You don't remember seeing them in the Upper Leather Tanneries?

A. No.

Q. Well, did Mr. Dennis say anything to you, when going through the tanneries, with respect to Government leather, and how it was selected?

A. The Government leather—

Q. (Interrupting.) Not what he said, but did he say anything?

A. He did.

Q. What did he say?

A. He said the Government leather was the best leather—they took for the Government contracts—and had been doing so.

Q. Now at any time when you were visiting the tanneries, did you make a visit to the Sole Leather Tanneries?

A. No.

218 Q. When you saw these Inspectors in the shoe factory, did you identify them as Government Inspectors?

Mr. KREEGER. I object to that, Your Honor.

The Court. She already answered she didn't.

Mr. SWARTWOOD. I am talking about the shoe factory.

Mr. KREEGER. Your Honor has excluded questioning with respect to the shoe factory.

Mr. SWARTWOOD. I withdraw the question. That is all.

Redirect examination by Mr. KREEGER:

Q. How long did your first inspection visit to the Endicott Johnson Corporation last? How many days were you at the Endicott Johnson premises?

A. Two or three.

Q. When you left was it at official directions?

Mr. SWARTWOOD. That is objected to.

The COURT. Overruled.

Mr. SWARTWOOD. Exception.

The WITNESS. We had another matter, a wage payroll matter, that took a time to transcribe.

Mr. SWARTWOOD. I move to strike out the answer.

By Mr. KREEGER:

219 Q. Just state the answer, Yes or No. When you left the Endicott Johnson Corporation premises after the official—

A. (Interrupting.) Pending a ruling.

Mr. SWARTWOOD. Same objection.

The COURT. I will allow "pending a ruling."

Mr. SWARTWOOD. Exception.

The WITNESS. Pending a ruling on deductions.

Mr. SWARTWOOD. I move to strike out that answer.

The COURT. That may go out.

By Mr. KREEGER:

Q. Was your departure with the knowledge and consent of your superiors?

A. It was.

Mr. KREEGER. That is all.

Mr. SWARTWOOD. No further questions.

Mr. KREEGER. William E. Stevenson.

The COURT. How long is this going to be? Will you finish tonight? (to the stenographer.) You needn't take this. (Discussion outside the record which the stenographer was directed not to take.)

220 WILLIAM E. STEVENSON called as a witness in behalf of the Government, and being duly sworn, testified as follows:

Direct examination by Mr. KREEGER:

Q. Will you state your full name and title, Mr. Stevenson?

A. William E. Stevenson, Associate Liaison Officer and Field Investigator, Division of Public Contracts, United States Department of Labor.

Q. What are your functions and duties as an Investigator?

A. To visit certain industrial plants who are performing operations—

Mr. SWARTWOOD (interrupting). I will concede what your duties are.

Mr. KREEGER. No concessions—I must qualify the witness.

The WITNESS (continuing). Performing operations in fulfillment of Government contracts subject to the Public Contracts Act.

By Mr. KREEGER:

Q. When were you first assigned to the Endicott Johnson case?

221 A. In the early part of February 1939.

Q. Did you have a conference with Mr. H. A. Swartwood and Mr. Charles Johnson shortly after your arrival?

A. I did.

Q. When did that conference take place?

A. About the middle of February 1939.

Q. Can you state what was said to you at that conference by Mr. Swartwood or Mr. Johnson, or both, insofar as the rubber plant and the tanneries were concerned?

A. I went to Mr. Swartwood's Office. Mr. Johnson was there. I asked them for the release of records to the Division for computation purposes. These records included records of employees engaged in the tanneries. Mr. Swartwood said that we are working and operating on the assumption that the tanneries are not within the jurisdiction of the Act, and until I get a definite ruling that they are within the scope of the Act I will not release any records. Mr. Johnson told me that several of the firms who were manufacturing shoes for the Government did not tan their own

222 leather, and he couldn't understand why the Division held the Endicott-Johnson Corporation to be subject to the Act because they tanned their leather. I cited the steel industry to him, and told him it was my understanding they were within the jurisdiction of the Act when I was assigned to the inspection. He further stated in corroboration of Mr. Swartwood's statement, that he wouldn't release any record until they had a definite ruling from the Division. I suggested I would write to the Division and get a ruling. I did write to the Division and, as far as I know, that resulted in a ruling by mail to the Endicott Johnson Corporation.

Q. At this conference, Mr. Stevenson, what was said, if anything, about the ear-marking of the materials that went into the Government shoes?

A. I asked Mr. Johnson if they could lift the material from stock for the purpose of manufacturing Government shoes. He

said that it was possible that they could do that. However, that he had no recollection that they had done that, and that certain operations or certain leather was so specified in the contract that they would have to process it during the period of performance on the contract, and that the current production in the tanneries may be used in the contracts. They hadn't made any segregation of employees so far as he knew.

Q. Mr. Stevenson, I show you proposed Government Exhibit Number 15 [handed to the witness]. Can you identify that?

A. This is a letter I dictated to Mrs. Hogue. She did the typing of what took place at a conference between Mr. Swartwood—

The COURT (interrupting). No; not what it contains. You identify it is a letter you dictated to Mrs. Hogue—addressed to whom?

The WITNESS. To Ralph J. Fogg, Chief of the Investigation Section.

By Mr. KREEGER:

Q. What is the date?

A. February sixteenth 1939.

Q. Do you know if that was received by the Public Contracts Division—of your own knowledge?

Mr. SWARTWOOD. I object.

The COURT. I will sustain the objection. You mention that, if it was called to the attention of the Defendants in any way—that letter?

224 The WITNESS. I don't believe I understand the question.

The COURT. Did the Defendants ever see that letter, so far as you know?

The WITNESS. Not so far as I know— if you mean the Endicott Johnson Company.

The COURT. Yes.

The WITNESS. I don't know if they have seen it.

Mr. KREEGER. I would like to offer it in evidence.

Mr. SWARTWOOD. I object to it.

The COURT. Sustained.

Mr. KREEGER. Exception. I would like to have marked as Government's Exhibit letter dated March fourth, 1939, signed Mary P. Hogue, and William E. Stevenson, addressed to Mr. Ralph J. Fogg.

(Letter dated March fourth, 1939, signed by Mary P. Hogue and William E. Stevenson, addressed to Ralph J. Fogg, marked "Government Exhibit Number 16" for identification of this date.)

Mr. SWARTWOOD. That is the same letter you just tried to introduce.

The COURT. No; it is a later date.

225

By Mr. KREEGER:

Q. I show you this document, Mr. Stevenson, and ask you if you can identify it?

A. This is a joint report signed by Mary P. Hogue and myself, directed to Ralph J. Fogg, Chief of the Investigation Section, dated March fourth, 1939, reporting our activities.

Mr. KREEGER. I wish to offer this in evidence.

Mr. SWARTWOOD. That is objected to on the ground it never came to the attention of the Defendants, and not binding on them.

The COURT. Sustained.

Mr. KREEGER. Exception. (To Mr. Swartwood.) Your witness.

Cross-examination by Mr. SWARTWOOD:

Q. Mr. Stevenson, when you came to Endicott in the middle of February 1939 did you know we were operating tanneries and rubber mills?

A. When I first came to Endicott?

Q. Yes.

A. I knew it. I had been told you were by the Chief of Investigators.

226 Q. That was one reason you came up?

A. Yes, sir.

Mr. KREEGER. I object to that question.

The COURT. That may go out if you want it.

Mr. KREEGER. It has no relevance.

By Mr. SWARTWOOD:

Q. Now you stated this conference you had with Mr. Johnson and me was in the middle of February 1939 and am I correct in my understanding that that interview took place on a request from you to take certain of the records pertaining to these tanneries and rubber mills, to be sent to Washington and transcribed?

A. That's right.

Q. Is that right?

A. That's right.

Q. When you made that request, did I tell you I had a conference with Mrs. Hogue in the latter part of June—the first part of July—regarding the same matter?

A. On that same occasion, I don't think you did.

Q. At any time?

A. I don't recall.

227 Q. That I had a conversation with Mrs. Hogue in the latter part of June, or the first of July 1938, in which I stated the company's position relative to tanneries and rubber mills?

A. Frankly I have no recollection of that.

Q. During this conversation with Mr. Johnson and me, on February sixteenth, 1939, we did state to you what our position was relative to those tanneries and rubber mills?

A. Yes, sir.

Q. And as a result you wrote a letter to the Department asking for a ruling?

A. Yes, sir.

Q. And as a result of that, was the ruling of February twenty-third, 1939, Government's Exhibit 6 written?

A. I believe that is the letter—I don't know.

Q. I will show you the exhibit. It is exhibit 6.

Mr. KREEGER (as Mr. Swartwood is searching for the exhibit). I don't have any (pause). This is 6 [handing same to Mr. Swartwood].

By Mr. SWARTWOOD:

Q. I show you Government's Exhibit Number 6, and ask you if that is a letter which was written by Mr. Metcalfe Walling 228 to Mr. Charles Johnson, as a result of the conference you had with us on February sixteenth? (Exhibit handed to the witness.)

Mr. KREEGER. I object to that question on the ground that a similar question has been excluded with respect to the reason for and the circumstances surrounding this letter.

The COURT. No; I think they were different, Mr. Kreeger. I think you asked about the facts and circumstances. I am, however, going to change that a little (to the witness). Was that letter you referred to, was that written after you made your report after the conference?

The WITNESS. Yes, sir.

By Mr. SWARTWOOD:

Q. Did you ever make any inspection of the tanneries or rubber mills, Mr. Stevenson?

A. Not officially, no.

Q. Did you go through them at any time to see how the leather was processed, either the sole leather, upper leather, or calf skin tanneries?

A. Not officially, no.

The COURT. Didn't you?

The WITNESS. I went one noontime with Mr. Turner. 229 I didn't make an inspection. I went here and there.

By Mr. SWARTWOOD:

Q. Were they working at the noon hour at the tanneries?

A. No.

Q. So you didn't see any of the process regarding sole leather, upper leather, or leather from the calf skin tanneries?

A. That's right.

Q. When you came to my office, on February sixteenth, did you come at the request of Richard Turner, the Paymaster?

A. I did contact the Paymaster, Mr. Turner, three or four days before that. I asked him if he would release the records to the Division for computation purposes. He said he had no authority to release records, or let any records go out of the office, but he would make an appointment with Mr. Swartwood, meaning you, at a later date, and as a result an appointment was made with you, or I think so—at least an appointment was made with you. He came to my room, and said you would meet me. That was when I went to your office.

230 Q. That conference took place about one-thirty in the afternoon—right after the noon hour?

A. That's right—yes, sir.

Q. Do you remember whether or not I stated to you at that time that that was the first time Mr. Johnson and I knew you were making an inspection of the tanning and rubber mills?

A. You did make that statement.

Mr. SWARTWOOD. That's all.

Redirect examination by Mr. KREEGER:

Q. Mr. Stevenson, where did you get the books and records you were inspecting at the Endicott Johnson premises that covered the tanneries and the rubber mills?

A. The books and records inspected were in the Endicott City Office and made available by Mr. Turner, the Paymaster.

Q. Where did you make the inspection?

A. In the Endicott City Office.

Q. Did Mr. Turner have custody of those books, so far as you knew?

231 A. Yes; we appealed to Mr. Turner when we went there for certain records. He did furnish them or designate some other individual.

Q. Did he see—or know what you were doing with those books and records?

Mr. SWARTWOOD. What books and records?

Mr. KREEGER. The ones you got from Mr. Turner.

Mr. SWARTWOOD. Relating to what?

Mr. KREEGER. He just testified that books relating to the tanning and rubber mills were given him by Mr. Turner.

The COURT. I didn't know [to Mr. Kreeger]. If you have copies of the books and records—

Mr. KREEGER (interrupting). We have copies of some. I think it might have been transcribed showing violations, but it is not complete.

The COURT. I am not going into that.

Mr. KREEGER. Well, the counsel for the Defendant has just raised the question if the official knew what he was doing. I want to show what he was doing was in full—

The COURT (interrupting). I am not going to allow any issue that the Government Officials did anything that wasn't within their line of duty.

232 Mr. KREEGER. That is all, Mr. Stevenson.

Mr. SWARTWOOD. I think that is all, Mr. Stevenson.

Mr. KREEGER. Your Honor, I don't have any further testimony to present. Subject to Mr. Swartwood's presentation of his case, I will delay any further presentation until that time.

Mr. SWARTWOOD. If Your Honor please: As I stated at the commencement of the hearing, it will be necessary for me now, it appears, to produce Mr. Dennis, Mr. Shenck, and Mr. Clark, and I would also like to produce Mr. Knickerbocker, of the Sole Leather Tannery, to show when those selections are made, and so on.

The COURT. What time—how early can you be here tomorrow?

Mr. SWARTWOOD. Whatever time you want them. We go to work at seven. We can get up earlier to be here at nine or nine-thirty, ten?

The COURT. Would nine-forty-five be inconvenient?

Mr. SWARTWOOD. Or ten would be convenient.

The COURT. Would that be inconvenient?

Mr. SWARTWOOD. That is alright. We can start at seven.

The COURT. We will adjourn until nine forty-five.

233 {Discussion outside the record which the stenographer was directed not to take,}

The COURT. Recess until ten o'clock.

Adjournment taken at 6:10 P. M. until Friday, April 25, 1941, 10:00 A. M., Syracuse, New York.

234 In the United States District Court for the Northern District of New York

FRANCES PERKINS, SECRETARY OF LABOR OF THE UNITED STATES,
PLAINTIFF

v.

ENDICOTT JOHNSON CORPORATION, A CORPORATION, AND HOWARD A. SWARTWOOD, SECRETARY, ENDICOTT JOHNSON CORPORATION,
DEFENDANTS

Minutes of proceedings had in the above entitled Matter at a Regular Term of the United States District Court held in and for the Northern District of New York, Federal Building, Syracuse, New York, on Friday, April twenty-fifth (25th), 1941, commencing at ten o'clock in the forenoon, Eastern Standard Time.

Presiding: Honorable **FREDERICK H. BRYANT**, United States District Judge.

235 **Appearances:** Honorable **Ralph L. Emmons**, United States Attorney in and for the Northern District of New York, Federal Building, Binghamton, New York; and **David Lloyd Kreeger**, Esquire, Special Assistant to the Attorney General, Washington, D. C.; and **Clifford P. Grant**, Esquire, Attorney, Division of Public Contracts, Department of Labor, Washington, D. C., Solicitors for the Government; **Howard A. Swartwood**, Esquire, Attorney and Counselor at Law, Endicott, New York; and **William H. Pritchard, Jr.**, Esquire, Attorney and Counselor at Law, Endicott, New York, Solicitors for the Defendants.

236 **Mr. SWARTWOOD.** If Your Honor please: In the opening of the hearing, yesterday, you said you would confine the evidence to the sole question whether the stipulations in the Endicott Johnson shoe contracts covered operations in the tanneries and rubber mills, and would decide solely on the pleadings and evidence in this hearing. Your Honor stated in his opinion of February first, "Defendants, in support of their position, have, through pleadings and affidavits, set forth facts regarding the industries, usages, and interpretations of the trade, interpretations and classifications made by the N. I. R. A., Census Department, and other Governmental Agencies, rules and regulations of the Commerce Department, Public Contract and Wage and Hour Divisions of the Labor Department, etc. To say the least, they have raised an issue, partly factual and partly legal, that sometime and somewhere must be decided." Now, in accordance with your two statements, the one of yesterday, and the one in the

237 opinion, **Mr. Pritchard** and I spent considerable time last night in an effort to narrow down to those issues the various exhibits and testimony which we propose to produce this morning. We shall endeavor to confine our testimony to simply supplementing the exhibits which have been put in by the Plaintiff, some of which would have been our exhibits, and, also, to the matters indicated by your statement of yesterday, and the opinion.

Mr. KREEGER. If the Court please: I would like to supplement **Mr. Swartwood's** statement—I don't think it materially affects his presentation. To the extent he said that the sole issue here is the tanneries and rubber mills, I would like to state that under the pleadings they have also refused to produce records in the sole cutting, counter, and carton departments.

The Court. I mentioned yesterday, I recall, the tannery and rubber mills, and that other factories were in question. I did not, yesterday, name them because I wasn't altogether sure I had

238 in my memory the exact names of them, but I understand they are all involved—the tanneries, the carton, and the sole-cutting factories, and something that has to do with heels.

Mr. KREGER. No; I think the counter department. I think they have several sole-cutting departments, and then they have a counter department. Mr. Swartwood—

Mr. SWARTWOOD (interrupting). It is all in evidence under Exhibit 11 of the Plaintiff. I would like to have these papers marked for identification:

(Circular Letter #200, dated January 5, 1937, written by the Treasury Department, Procurement Division, and letter dated December 30, 1936, written by Gerard J. Reilly, Acting Administrator, marked "Defendant's Exhibit A" for identification of this date.)

(Decision by the Secretary of Labor, marked "Defendant's Exhibit B" for identification of this date.)

239 (Pamphlet—"Wage Order, Minimum Wage Rates in the Shoe Manufacturing and Allied Industries, marked "Defendant's Exhibit C" for identification of this date.)

(Pamphlet—"Leather and Leather Products," marked "Defendant's Exhibit D" for identification of this date.)

(Pamphlet—"Leather and Its Manufactures," marked "Defendant's Exhibit E" for identification of this date.)

(Preliminary Report—"Leather: Tanned, Curried, and Finished," marked "Defendant's Exhibit F" for identification of this date.)

(Pamphlet—"Boot and Shoe Manufacturing Industry," marked "Defendant's Exhibit G" for identification of this date.)

(Pamphlet—"Leather Industry," marked "Defendant's Exhibit H" for identification of this date.)

240 (Pamphlet—"Leather Industry," marked "Defendant's Exhibit I" for identification of this date.)

(Pamphlet—"Rubber Manufacturing Industry," marked "Defendant's Exhibit J" of this date.)

Mr. SWARTWOOD. Now, if Your Honor please: The papers which I have had marked for identification have been conceded to be true copies of the documents which they purport to be, in the stipulation signed by Mr. Francis M. Shea, one of the attorneys for the Plaintiff, and the foundation for these papers is laid; we think sufficiently, in the Plaintiff's Exhibit 13, which is the testimony of the Administrative Hearing, which they have in evidence, so I would like to offer in evidence, first, Defendant's Exhibit A, which is a Circular Letter, numbered 200, dated January fifth, 1937, written by the Treasury Department, Procurement Division, and containing a letter dated December thirtieth, 1936, written by Gerard D.

Reilly, Acting Administrator of the Public Contracts Act.
241 to Mr. William S. Elliott, Vice President and General Counsel, International Harvester Company.

Mr. KREEGER. I object to that, Your Honor, on the ground that is the precise letter that was before you yesterday and was excluded on objection.

The COURT. I will sustain the objection. I think that is an interpretation of the Department that should be set forth in a brief, as I held Mr. Kreeger yesterday, to set forth other interpretations in the brief.

Mr. SWARTWOOD. I now offer in evidence paper marked Defendant's Exhibit B for Identification, which is a Wage and Hour Order issued by Frances Perkins, Secretary of Labor, on the twenty-first day of December 1937 establishing a minimum wage of forty cents per hour for the men's welt shoes, under the Walsh-Healey Act.

Mr. KREEGER. No objection to the introduction, Your Honor. I would like to state for the record, since Your Honor has ruled out any question of violations, this would not, of course; be
242 considered in connection with whether they have any violations other than of this minimum wage order.

Mr. SWARTWOOD. Would you like to have me state my purpose—

The COURT (interrupting). You may now or later. If there is no objection, I will receive it.

(Decision by the Secretary of Labor, previously marked for identification, received in evidence as Defendant's Exhibit B of this date.)

Mr. SWARTWOOD. I propose to introduce it to show the minimum wage order was limited to the manufacture of men's welt shoes, and had nothing to do with tanning and rubber departments of the Defendant's.

Mr. KREEGER. That is conceded by the pleadings. I point out that other violations are also charged.

Mr. SWARTWOOD. I now offer Defendant's Exhibit C, which is a Minimum Wage Order issued by the Wage and Hour Division of the United States Department of Labor, which constitutes
243 Title 29, Chapter V, of the Code of Federal Regulations, establishing a minimum wage for the shoe manufacturing and allied industries.

Mr. KREEGER. I object to that, Your Honor, on the ground it is a regulation promulgated under a totally dissimilar act. No connection between the Wage and Hour Act and the Act before this Court has been shown. The languages are totally different, and I think that should be excluded on that ground alone. The second ground is that it is a matter that should be in a brief, or judicial notice of—

The COURT (interrupting). On interpretations I, of course, can take judicial notice in a brief, on rules or regulations of a Department. I rather doubt it is a judicial document sufficient to ask the Court to take judicial notice. I can see no materiality to this unless it bears upon the classification of industries.

Mr. SWARTWOOD. Yes; as referred to in your opinion of February first—that is our purpose in introducing it.

Mr. KREGER. As stated at the beginning, the issues are limited. This refers to an entirely different act. It may be the standards under another Act call for classification of industries, but our Act doesn't do that.

The COURT. Objection overruled. I will receive it, but I doubt very much the materiality of it.

(Wage Order, Minimum Wage Rates in the Shoe Manufacturing and Allied Industries, previously marked for identification, received in evidence as "Defendant's Exhibit C" of this date.)

Mr. SWARTWOOD. I now offer this paper in evidence, marked Defendant's Exhibit "D" for identification, which is a census of Manufactures, 1935, Leather and Leather Products, issued by the United States Department of Commerce, Bureau of Census, in which is defined an industry known as "Leather and Leather Products," "Leather: Tanned, Curried, and Finished," and a definition on page nine of "Boots and Shoes, Other Than Rubber."

Mr. KREGER. I object to that, Your Honor, as purely irrelevant—the purpose of defining an industry in the census is completely disassociated with this case. It may be the Defendant's activities are performed in several industries, as far as the census is concerned, but in the Act before Your Honor this does not apply. It may be the rubber industry, as defined by the Census Division, differs from the leather industry, but the contractor in question performed operations performed by separate—

The COURT (interrupting). Of course, it has to be interpreted in accordance with your Act—no question about that. I think I should have before me—if the classifications of different departments has a bearing on the one question, whether the tanning of leather is a part of the manufacturing of shoes. That is really where I am interested as far as the tanneries are concerned. I think I will overrule the objection and take those definitions of the other Departments.

Mr. KREGER. Exception.

(Pamphlet—"Leather and Leather Products," previously marked for identification received in evidence as "Defendant's Exhibit D" of this date.)

246 Mr. SWARTWOOD. I now offer in evidence paper marked "Defendant's Exhibit E" for identification, which is the Census of Manufactures—1937, issued by the United States De-

partment of Commerce, Bureau of Census, which contains a definition of the industry, "Leather: Tanned, Curried, and Finished—Regular Factories"; and the industry, "Leather: Tanned, Curried, and Finished—Contract Factories"; and also a definition of the industry, "Boots and Shoes, Other Than Rubber."

Mr. KREGER. I object to that, Your Honor, on the same ground, and would like to call Your Honor's attention to the fact that under the Walsh-Healey Act the term "Industry" is not used insofar as our complaint and application is concerned; that is, the violation alleged therein covers the term "persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract." It may be to the Census Bureau this contractor performs operations that several industries normally perform, but so far as the Walsh-Healey Act, the definition of an industry has no relevance.

247 The COURT. Overruled. I am going to take all definitions for what they may be worth, or may not be worth. You may have an exception.

Mr. KREGER. Exception.

(Pamphlet—"Leather and Its Manufacture," previously marked for identification received in evidence as "Defendant's Exhibit E" of this date.)

Mr. SWARTWOOD. I now offer "Defendant's Exhibit F" for identification, which is "Census of Manufactures—1939," Preliminary Report issued by the Department of Commerce, Bureau of Census, and defines an industry, "Leather: Tanned, Curried, and Finished."

Mr. KREGER. Same objection.

The COURT. Same ruling.

(Preliminary Report—"Leather: Tanned, Curried, and Finished," previously marked for identification, received in evidence as "Defendant's Exhibit F" of this date.)

248 Mr. SWARTWOOD. I now offer in evidence paper marked "Defendant's Exhibit G" for identification, which is the Code of Fair Competition for the Boot and Shoe Manufacturing Industry, approved October third, 1933, by President Roosevelt, National Recovery Administration Registry No. 904-1-05, and containing as Article One, Section One—"Purposes"—a definition of the Boot and Shoe Manufacturing Industry.

Mr. KREGER. I object to that, Your Honor.

The COURT. Same ruling. You may have an exception.

Mr. KREGER. Exception.

(Pamphlet—"Boot and Shoe Manufacturing Industry," previously marked for identification, received in evidence as "Defendant's Exhibit G" of this date.)

Mr. SWARTWOOD. I offer in evidence Defendant's Exhibit H for Identification, which is the Code of Fair Competition for the Leather Industry, as revised August twenty-third, 1933, and approved September seventh, 1933, by President Roosevelt, under National Recovery Administration Act Registry 930-1-01, 249 and containing as Article Two, "Definitions," a definition of the "leather industry."

Mr. KREEGER. Objection.

The COURT. Overruled.

(Pamphlet—"Leather Industry," previously marked for identification, received in evidence as "Defendant's Exhibit H" of this date.)

Mr. SWARTWOOD. I now offer in evidence paper marked "Defendant's Exhibit I" for identification, which is an Amendment to the Code of Fair Competition for the Leather Industry, approved October third, 1934, under National Industrial Recovery Act Registry 930-1-01, and containing as paragraph four a modification of Article two of the original code, by adding a paragraph classifying various divisions of the leather industry.

Mr. KREEGER. I object to that, Your Honor. I don't know if I stated my objection to the code is also based on the fact it was promulgated under an earlier act, passed in 1933, having a different language.

250 The COURT. I am going to take it.

(Pamphlet—"Leather Industry," previously marked for identification received in evidence as "Defendant's Exhibit I" of this date.)

Mr. SWARTWOOD. I now offer in evidence paper marked "Defendant's Exhibit J," which is the Code of Fair Competition for the Rubber Manufacturing Industry, as approved December fifteenth, 1933, by President Roosevelt, under the National Recovery Administration Registration 899-04, and containing as Article One—Definitions, Section One—a definition of the Rubber Manufacturing Industry, and various divisions thereof, and as Chapter Four, Article One—Definitions—Section One—a definition of the Rubber Footwear Division.

Mr. KREEGER. Same objection.

The COURT. Overruled.

Mr. SWARTWOOD. I am not through yet, and as Chapter six, Article One—Definition—Section One, a definition of the Heel and Sole Division.

251 Mr. KREEGER. Excuse me, Your Honor, I don't like to interrupt Mr. Swartwood, but I think the comments being made by Mr. Swartwood—

The COURT (interrupting). I am going to take the whole exhibit, and his calling to my attention I will consider the same as

I did yesterday your calling my attention to a particular part of the testimony that was taken, and the only point of your calling to my attention, or his calling to my attention, is in aiding me to look into the portions you think are important.

(Pamphlet—"Rubber Manufacturing Industry," previously marked for identification, received in evidence as Defendant's Exhibit J of this date.)

Mr. SWARTWOOD. If Your Honor please: May I have an exception to your ruling excluding Defendant's Exhibit A, which is the Circular Letter?

The COURT. Yes.

Mr. SWARTWOOD. I would like to call Mr. Ralph B. Clark.

252 RALPH B. CLARK, called as a witness in behalf of the Defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SWARTWOOD:

Q. Mr. Clark, where do you reside?

A. Endicott, New York.

Q. What is your capacity with the Endicott Johnson Corporation?

A. General Manager of the Upper Leather Tanneries.

Q. And were you acting in that capacity from October 1936 to October 1938 during the performance of these fifteen Government contracts?

A. Yes, sir.

The COURT. Will you speak a little louder?

The WITNESS. Sorry. I have a cold. I will do the best I can.

The COURT (to the Attorneys). Can you hear him?

Mr. KREEGER. I can hear him all right.

By Mr. SWARTWOOD:

Q. Mr. Clark, will you, for the benefit of the Court, describe the various steps in the process of tanning Upper Leather.

253 The COURT. Just to show my ignorance—Upper Leather, that is the leather that goes in the top of the shoes?

The WITNESS. Yes.

The COURT. All right.

The WITNESS. Hide is first taken and put in drums; washed to be cleaned; and soaked in water; and then it is taken from there and put in a solution of lime and sodium sulphite, which loosens the hair. The hair is then removed, and from there it goes to the "pickling operation."

Mr. KREEGER. Sorry, I didn't hear that?

The WITNESS. "Pickling operation," which is the preparation of the fibres for the tanning. Then it goes into a solution of bichro-

mate soda, glucose, and sulphuric acid, which is the actual chrome tanning.

By Mr. SWARTWOOD:

Q. Is this step known as the chrome tanning known as anything else?

A. After it comes out of the chrome tanning we call it the "Blue" then.

254 Q. After the hides pass to the point you described, in to the chrome tanning process, it is in the "Blue" Department.

A. The hides are actually blue when they come out.

The COURT. The hides are blue!

The WITNESS. Yes, sir.

By Mr. SWARTWOOD:

Q. And what takes place after that "Blue" Department in the preparation of upper leather?

A. When they come into the "Blue" Department the hides are taken to a sorting table where we pick out the different kinds of leather—it may be a black sided leather, or color, or elk—and as we sort we put a punch hole in the back of the hide.

Q. Why is that punch hole put in?

A. So as to designate the different kinds.

Q. You mean by that, to be used for different purposes?

A. Yes, sir.

Q. Does that include the Government?

A. Yes, sir. When we use them for the Government we put the punch hole in to designate the difference.

255 Q. What is the difference in the leather you select for the Government, and the leather you select for civilian shoes?

A. We pick out the best hides we can find that might be suitable for Government shoes.

Q. You say you pick out the best hides that may be suitable. What do you mean by that?

A. We make further sortings in the tanneries to find out when we get the leather all finished if it is suitable for Government shoes. If it isn't we take it out, and use it for civilian shoes.

Q. What happens in the tanning process after this first designation of the leather in the "Blue" Department?

A. After they are sorted, they are taken to the splitting machine where they are split to the desired weight. I am speaking of the dress shoe leather that was made for boots.

Q. Yes, sir.

A. And then colored with aniline dyes to the desired color, and from there it goes to the drying room, where the leather is

dried out. Then it goes to what we call the stacking machine, which is a softening operation, which brings the leather back to a mellow feel. And from this point it goes to what we call the buffing room, where the top of the grain is very lightly smoothed with a fine sand paper. And then any leather we have picked out before, which might be used for Government leather, is then again selected, and anything that doesn't look suitable, is taken out and used as civilian work. From this point it goes to the finishing room where we apply four or five coats of finish or color, and then it is transferred to the Shipping Department, where the leather is again sorted, and any leather that might be suitable for Government shoes is laid aside for the Government for the shoe factory.

Q. Now you say the processes you have described after the "Blue" Department all related to leather made for army boots?

A. That's right.

Q. Is there any difference in the process in respect to upper leather for service shoes?

A. The process is more or less the same up through the "Blue" Department. The sorting is done there the same, but instead of the leather being colored with dyes it is retanned in vegetable liquids or dyes extracted from bark. And the leather follows practically the same process except the service shoe leather is put into a "crust."

257 Q. What do you mean by "crust," Mr. Clark?

A. That is where we pile this type of leather. After it has been piled—

Q. (Interrupting.) You pile all kinds of vegetable tanned leather in different piles?

A. That's right.

Q. And it is selected according to the use it is to be put?

A. Yes, sir.

Q. Now, is this process you described the same that was in existence in the Calf Skin and Upper Leather Tanneries of the Endicott Johnson Corporation from October twenty-ninth, 1936, to October fourteen, 1938?

A. Yes, sir.

Q. Mr. Clark, is it possible when the tanning process is started with the raw hide, to determine whether or not it will be used for Government shoes or civilian shoes?

A. No; it is not.

Q. When is it first determined whether or not the tanning—the leather which is being tanned is suitable for Government leather?

A. In the "Blue" Department.

258 Q. And you have described what the "Blue" Department is, have you not?

A. Yes, sir.

Q. Now, how do you mark the hides in the "Blue" Department with respect to these different classes of leather?

A. With a punch hole in the back.

Q. And you have different punch holes for different kinds of leather?

A. Yes, sir.

Q. Will you state to the Court what some of these punchings are?

A. Black leather—one punch hole in the back; for colored side leather, which I have on, we possibly use four punch holes in the back; some with three; and I think army leather, at that time, had two punch holes.

Q. You mean that time between October twenty-ninth, 1936, and October eleventh, 1938?

A. Yes, sir.

Q. And two punch holes?

A. Yes, sir.

Q. And where is that placed in the hide?

259 A. In what is called the back binding.

Q. Are those holes put through the hide?

A. Yes, sir.

Q. Now, who puts these punch holes in the hide in the "Blue Department."

A. I beg your pardon?

Q. Who puts the punch holes in the hide in the "Blue" Department?

A. The sorter.

Q. And is the sorter an employee of the Endicott Johnson Corporation?

A. Yes, sir.

Q. During the period from October twenty-ninth, 1936, to October eleventh, 1938, was there any Government Inspector putting punch holes in the hides in the "Blue" Department in either the Calf Skin or Upper Leather tanneries?

A. No, sir.

Q. Has there at any time, when Endicott Johnson Corporation was manufacturing upper leather, been a Government Inspector in the Upper Leather or Calf Skin Tannery?

A. No, sir.

260 Q. Now you stated in your description of the tanning process an operation known as buffing. Will you state what selection of the hides or leather is made at the buffing machine?

A. Well, we sort the leather over as it is buffed to pick out any hides, out of what we have designated that might be suitable for army leather, for a further sorting, so we will eliminate anything that isn't suitable.

Q. If you were not making Government leather at this time, or making Government shoes, would there be any selection with respect to the type of leather with respect to civilian shoes, in the buffing room?

A. No, sir.

Q. After the buffing room what happens to the leather, or what sort of selection is made?

A. It goes through the finishing operation, which I described previously, and then in the shipping department we make a further selection of this particular type of leather, and pick out what we think possibly may go into army shoes, and that leather is then measured and the footage is marked on the back side of each hide, and tied in bundles, and sent to the factory.

261 Q. At any time from the raw hide to the time it is piled up in the bundles, is there any Government stamp or contract numbers placed on the hides, or the leather?

A. No, sir.

Q. Yesterday Mrs. Hogue, whom I think you know—

A. (Interrupting.) Yes; I remember Mrs. Hogue.

Q. (Continuing.) testified that at the "Blue" Department a blue stamp was placed on the hides, reading "Gov't." or "GC." Was any such hide—any such stamp placed on any hides manufactured into leather for Government shoes by the Endicott Johnson Corporation, from October 1936 to October 1938?

A. No, sir.

Q. Would it be possible, Mr. Clark, to put a stamp, a blue stamp, on these hides when they come out of the "Blue" Department?

A. You could put the stamp on, but it wouldn't stay there because the dye would cover it up, and it would wash off.

Q. The hides are blue at that time, I understand?

A. Yes, sir.

Q. Now what happens to this leather after it is piled in bundles in the shipping room in the Calf Skin or Upper Leather Factory?

362 A. We hold them there until the factory orders so much leather, usually by weight or size, then it is shipped to the factory stock room.

Q. Now at the factory stock room what occurs?

A. The stock room takes the leather and opens it, and looks it over, and he eliminates any hides he wouldn't think suitable

for army shoes. The balance is sent up to the cutter as leather that might be suitable for army shoes.

Q. And what is done with the leather which the factory stock room doesn't think is suitable for Government work?

A. That is returned to the tannery, and either made over, or made up in shoes to use it up.

Q. Mr. Clark, how long does it take to produce upper leather and deliver it to the factory, after the hide reaches the "Blue" Department?

A. Well, on the dress shoe leather we use for boots, it takes about twenty days.

Q. On the service shoes?

A. On service shoes it takes twenty-five or six days.

Q. During this period of twenty to twenty-six days,
263 where do you get the upper leather which is to be used for Government shoes?

A. Well, in the dress shoe leather, we don't carry any of that type in the "crust," so we have to go back to the "Blue," and start from the beginning, but on the service shoes, we always keep a supply which is used for civilian shoes, and we go to that pile and select what we think might be suitable for army shoes.

Q. Well then, from that time on the operations are the same with respect to buffing and finishing?

A. Yes, sir.

Q. Does the Government leather have a distinctive color in the finishing department?

A. They have a color which we match, but we still use the same color in some civilian shoes.

Q. And does the leather which is taken from the "Crust" pile during this twenty to twenty-six days follow the same steps from the shipping room to the factory you already described?

A. Yes, sir; it has a further sorting as it goes through.

Q. Do you know an occasion when Mrs. Hogue called upon you with regard to the tanning of Government leather?

264 A. Yes, sir.

Q. When was that, Mr. Clark?

A. I am not just sure, but I think it was in the latter part of 1938, possibly November. I am not exactly clear on the date.

Q. And as a result of Mrs. Hogue's visit, did you arrange for her to go through the Upper Leather and the Calf Skin Tanneries?

A. Yes, sir.

Q. Mr. Clark, when these hides are in the "Blue" Department will you describe just how they are removed and piled, and the

punch marks are put in, and what is done with them after the punch mark is put in?

A. They are brought up to the sorter on truck platforms, laid out lengthwise.

Q. With wheels on it?

A. Yes, sir; and the sorter stands on one side of the pile, and as he sorts the leather and puts the punch hole in it, the other fellow stands on the other side, and we separate right and left, and split the backs, and make different sizes; we separate left and right, and all those types of leather are put in different piles.

265 Q. Including the leather that might be for the Government—that is put in a separate pile?

A. Yes, sir; each kind is put in a different pile.

Q. Other kinds are designated for civilian wear at that point?

A. Yes, sir.

Q. Mr. Clark, this punch you punch these holes with, will you describe it please?

A. It is like a belt punch—like they punch holes in belts. It is like a pair of pinchers, except it has a tube in there, and it strikes something, and the tube goes through the leather and makes a hole.

Q. Is that the only stamp or punch that has ever been used by the Endicott Johnson Corporation in designating hides for Government purposes?

A. Yes, sir.

Q. Including Government leather?

A. Yes, sir.

Mr. SWARTWOOD. That is all.

Cross-examination, by Mr. KREGER:

266 Q. Mr. Clark, are you in charge of the tanning in all the Endicott Johnson Tanneries?

A. Only the Upper Leather Tanneries.

Q. Just Upper Leather?

A. No connection with sole leather.

Q. You testified the process is the same in the sole leather?

A. No, sir; I testified in the Upper Leather and the Calf Skin tanneries.

Q. You are in charge of the Upper Leather and Calf Skin Tanneries, and you testified to those processes?

A. Yes, sir.

Q. Are you the Superintendent?

A. General Manager of the Upper Leather Tanneries.

Q. You are charged with the function of seeing that the Government specification is complied with in the manufacture of leather?

A. Yes; in a way.

Q. Are you familiar with Government specifications?

A. Not altogether, except as regards to the kind of leather we make and the hides.

Q. Let me read you a few excerpts from the specifications to show what I am referring to: For example, Army specification 9-6 E, which refers to material and workmanship for shoes, service, made a part of about nine contracts, Government contracts, provides that, "Material for uppers shall be best chrome vegetable retanned cowhide, side leather, tanned from green salted hides." Then, Army specification B, made a part of about eight contracts, provides that middle soles "shall be full length and cut from full-grain oak or union-tanned leather, made from fine-haired green-salted hides," and Federal Specification KKI-261-A, referring to vegetable tanned leather, provides, "Hides shall be brined, green salted, or dry salted; no bull or buffalo hides shall be used"; that is made a part of approximately twelve contracts. Now, are you familiar with those specifications?

A. I have read them. I haven't read the one pertaining to sole leather.

Q. With respect to the Upper Leather and Calf Skin Tanneries, when the raw hides are received, are you charged with the duty of seeing that the Government specifications are followed with respect to the tanning or retanning of those hides?

A. Yes—well, of course, we don't know it is going into Government leather until it reaches the "Blue."

Q. What do you do that the hides will conform with specifications?

A. All we run is green salted hides.

Q. Everything you do would conform with Government specifications?

A. I think so.

Q. You pay particular attention to Government specifications?

A. Yes; we watch them. We have read the Government specifications.

Q. You make sure from the moment you receive the raw hides what you do to the hides in the tanneries will conform to Government specifications?

MR. SWARTWOOD. Your Honor, I object to the form of the question.

The COURT. I will sustain in that form.

By MR. KREGER:

Q. When you receive the raw hides, Mr. Clark, do you follow the Government specifications on the tanning of those hides from the very beginning?

A. Yes, sir.

Q. Now, Mr. Clark—

269 The COURT (interrupting). Am I correct that up to the time they come out of the "Blue" Room all the hides are handled in the same manner?

The WITNESS. Yes, sir.

The COURT. Regardless of what use they are later to be put to?

The WITNESS. Yes, sir.

By Mr. KREEGER:

Q. But that manner conforms to the specifications prescribed in the Government contract?

A. I don't think it specifies the process that must be used.

Q. Well, I just read you that material for upper leather must be best chrome tanned from green salted hides?

A. The "Blue" Department means it is chrome tanned.

Q. And the fact it must be tanned from green salted hides would require—

A. (Interrupting.) We don't use anything else in this type of leather.

Q. When you get the raw hides, when you start tanning, your method of tanning will conform to those Government specifications?

270 A. When we buy hides we don't always know they are going to the Government.

Q. I repeat my earlier question—do you take a chance those will conform to the Government specifications, or when you start the earliest stage do you know what you are doing will be under the Government specifications?

A. Yes, sir.

Q. Mr. Clark, you have testified to the various processes in tanning this leather, and you stated at the first sorting a punch hole is placed in a certain part of the hide?

A. Yes, sir.

Q. Would you say that was the best of the hides in which the punch hole is placed?

A. We punch them all.

Q. Well, now—

A. (Continuing.) You mean the ones for Government leather?

Q. The ones for the Government contracts—yes?

The COURT. I think he said he thought they used two holes for the Government contracts.

271 By Mr. KREEGER:

Q. Of course, you use this number for boots, and the holes vary?

A. No.

Q. Same holes used?

A. Only if made in this plant.

Q. How would you recognize the leather to be punched for Government use?

A. It is cleaner surfaced, has very few scratches—we try to pick out plump stock without too much spread.

Q. Would you say the best?

A. The best to our knowledge—that is, to the sorter's knowledge.

Q. I see. Now, how many days pass before you make that first sorting—after the soaking and pickling—the stages preceding the actual punching—how many days, normally?

A. About fifteen days.

Q. And in those fifteen days, where are the hides?

A. They come through the soaks, the limes, and the tanning.

Q. I see. After the hides are sorted and punched, they are then dyed and dried?

272 A. They are split first.

Q. Then they go through the other processes? When do you make the second selection?

A. In the Buffing Department.

Q. Then you select hides you are sure will go in the Government contract, under specifications for the Government contract?

A. We select what might be suitable Government leather. We can't be sure until the cutting.

Q. You make further selection thereafter for the Government contracts?

A. Yes, sir.

Q. How do you indentify those hides?

A. We just mark them with tags.

Q. By tags thrust in the holes?

A. I don't know if they are in the holes or not. We put them on somewhere.

Q. Is it a paper tag?

A. Yes, sir.

Q. What does it say?

A. It is just marked—well, I don't really remember what we did mark them. We usually designated the colors by number.

273. Q. When Government contracts are received, are you notified by the officers of the Endicott Johnson Corporation that you are to make a certain number—you are to tan a certain number of hides for Government shoes?

A. Yes, sir.

Q. And can you state to the best of your recollection any time during the period specified by Mr. Swartwood, October twenty-sixth, 1936, through about the middle of 1938, how much of

the time were you working pursuant to those Government contracts, that is, when you received notice Government contracts had been awarded, how long did it take normally before you finished operations under that contract?

A. You mean before we finished the contract?

Q. That's right.

A. That is pretty hard to say.

Q. So far as your plant, your tannery, was concerned?

A. It would depend on how much the contract was. Some are large and some small.

Q. Have you some idea how the periods range?

A. I don't think I could because we had a number of contracts that would follow one after the other.

Q. They followed one after the other—and you would
274 be working all the time under those contracts? Now has there been a period when no Government contracts were in effect, so far as your tanneries were concerned?

A. Yes, sir.

Q. How did your operations differ then?

A. In the C. C. C. leather, the process is the same as in civilian leather.

Q. How about on the army?

A. We make very few—you mean on the boots?

Q. On the boots?

A. We make very few shoes out of that type.

Q. And they use a different type leather than ordinary civilian leather?

A. Yes, sir.

Q. Do you put on different shifts when that happens?

A. No, sir.

Mr. SWARTWOOD. I object to that as incompetent and irrelevant.

The COURT. He said "No, sir." I will strike it out if you want.

By Mr. KREGER:

275 Q. Mr. Clark, how long does it take for leather to be tanned, so far as your operations are concerned, from the moment you receive the raw hides, until they leave your plant to go somewhere else?

A. On the dress shoe leather, it takes about thirty-five days.

Q. Thirty-five?

A. Thirty-five days.

Q. On dress shoes?

A. Yes, sir; on what we call boot leather.

Q. Boot leather—what of the army service leather?

A. On army service leather it takes about forty- or forty-one days.

Q. Is there any other type leather tanned in your tanneries for Government shoes other than the two mentioned?

A. Oh, yes.

Q. What other kind of Government leather?

A. Government leather? No.

Q. After about fifteen days have elapsed, then the first sorting is made, and holes are punched in the hides, showing they are suitable for Government contracts?

A. Yes, sir.

276 Q. And then the rest of the time, the difference between fifteen days and thirty-one days or forty-one days, whatever the period is, is spent with respect to those sorted hides in further processing of those sorted hides?

A. That's right.

Q. Can you state to your knowledge, or to your best recollection, what part of the hides would be sorted for Government use at the first sorting?

Mr. SWARTWOOD. That is objected to on the ground the Plaintiff has already put in an exhibit yesterday which covers the entire percentages of the amount of Government leather that was tanned during this period, as compared to the commercial leather.

Mr. KREGER. I am after more detailed—

The COURT (interrupting). Overruled. I will allow him to answer if he can.

Mr. SWARTWOOD. Exception.

By Mr. KREGER:

Q. For example, you take the operations during any one week, when operating under Government contracts, and sorting hides for Government contracts—now, what part of the hides would be sorted, roughly?

277 A. Well, on the service shoes, I don't think we ever sorted any higher than possibly fifteen percent.

Q. About fifteen percent of the hides that are tanned, are sorted for the Government use?

The COURT. Hardly that. He said "never higher."

By Mr. KREGER:

Q. Never higher—what is the usual percentage?

A. It depends on the size of the contract, and how many shoes our factory are going to cut; how much leather they need each day.

Q. I assume that also applies to your boot leather?

A. Yes, sir.

Q. Both boot and service shoe leather?

A. Yes, sir.

Q. Range up to fifteen percent?

A. Oh, no. The boot contracts are very small, and we never sort on the boot leather—oh, I don't think much over five percent.

Q. After you sorted the leather for the Government shoes, and that leather went through the various subsequent steps of tanning, was the same thing being done simultaneously to the leather not stamped for Government work?

278 A. The civilian we don't sort at the buffing department. We sort at the "Blue."

Q. I mean the first sorting, where you punch the holes?

A. The "Blue" sorting?

Q. That's right. What happened to the civilian leather you segregated from the leather for the Government contract?

A. That is punched the same way—different punchings—but handled the same way.

Q. It all goes through the tanneries the same way?

A. The dress-shoe leather goes through the same process, except for the color. We put on a different color.

Q. I see, but when you put the Government leather through the next steps, your buffing, tying, etc., do you throw those in with the commercial leather, or do you put them in separate vats or different—

A. (interrupting). I don't understand. Will you repeat that?

Q. Let's go back to where the first punch holes are put in the hides for hides going for use under the Government contract—what happened after that sorting? Are they mixed in with other hides, or separate from that point?

279 A. Each kind of leather is kept separate.

Q. How many employees are employed in your tanneries which you are in charge of?

The COURT. Is that at all material?

Mr. KREEGER. Your Honor, I wish to bring out, if I can, through this witness, the number of employees or percentages that work with respect to these various processes.

The COURT. All right.

The WITNESS. In the Calf Skin Tannery, about six hundred seventy.

By Mr. KREEGER:

Q. About six hundred seventy—all upper leather tanneries?

A. No; just the Calf Skin, or where the dress shoe or foot leathers are made.

Q. In the other tanneries?

A. In the other tanneries about, I think, a little better than seven hundred. I don't remember just exactly.

Q. About thirteen hundred and seventy for both tanneries?

A. A little better than seven hundred.

Q. Do those employees have segregated duties—some sorting—

280 Mr. SWARTWOOD. I object to that as not within the issues stated at the commencement of the hearing.

The COURT. I will sustain the objection.

Mr. KREGER. Your Honor, I think that question is relevant.

The COURT. I think you are trying to trace violations. That is what I—

Mr. KREGER (interrupting). No, Your Honor; I am trying to show that Government leather is segregated, and a substantial number do work on the leather as segregated, so if the contention is made, as apparently it was, that the process as it was installed, was such that they can't tell us—

The COURT (interrupting). I am willing to have him show the segregation, but when you get down to the number who work on the segregation it is immaterial. I will allow you to show the processes to see whether or not it was segregated.

By Mr. KREGER:

Q. Will you state again when the second sorting is made?

A. At the buffing machine.

281 Q. At the buffing machine, and there you sort out the hides that are shown to be superior, for the Government contracts?

A. The ones we think might be suitable for Government leather.

Q. What about the others? What is done with those?

A. They go into civilian shoes!

Q. Go back for civilian use? Can you state what percentage the rejection is at the second sorting process?

A. Well, it varies. It may run anywhere from one to three or four percent.

Q. Of rejection?

The COURT. Mr. Clark, possibly we are somehow working under misapprehension. After your hides are punched, you say they are sorted. Now, is each assortment handled in the future processes separately from the other?

The WITNESS. You mean the army leather, Your Honor?

The COURT. Yes.

The WITNESS. Each type of leather is handled separately, except the army leather is the only one we make a sorting of at the buffing machine,

282 The COURT. What I meant, was, at the time your bunches go in the "Blue" room, until the time they reach the next step, are there certain people working on the army work exclusively?

The WITNESS. No, sir.

The COURT. Just explain how it is handled. I think that is what both Mr. Kreeger and I want.

The WITNESS. After the leather is sorted at the "Blue" room, where they put the punch holes in, it goes into what we call a "pack," which would probably consist of about seventy-five sides of leather, and those seventy-five sides are kept together in that "pack" on the way through, until it reaches the buffing room, and a man might work perhaps on army leather for perhaps an hour, and then go on to civilian leather for an hour, and then get another load for the army.

The COURT. That is, the packs, if I am correct, don't go through one right after the other?

The WITNESS. No, sir. He might get a "pack" for the army, and in an hour get a "pack" of civilian, a different color or a different operation. Is that clear?

283 The COURT. Yes.

By Mr. KREEGER:

Q. Mr. Clark, you stated that there are two sortings provided for in your plants?

A. There are three.

Q. What is the third?

A. At the shipping room.

Q. At the shipping room?

A. That's right.

Q. When you sort the leather—each time I assume you are guided by the specifications under the contract?

A. Well, we are guided by the quality of the leather. We know it has to be of good quality.

Q. I see. So you have in mind conforming with Government specifications each time you sort the leather?

A. I don't think the specification has anything to do with the sorting of the leather.

Q. But they are sorted so you can supply the best leather under the Government shoes?

A. That is correct.

Q. Now, is there any inspection at all of the hides as they go through the various stages in your tanneries by someone representing the Government?

A. No, sir.

284 Q. No inspector of the Government has ever inspected any hides?

A. Not in the tannery.

Q. Has any inspection been made of those hides, before they are cut, by a Government Inspector?

A. Well, I don't think they actually make an inspection. They look over the leather once in a while. I don't think there is an inspection until after they are cut. I don't think they inspect until after the cutting.

Q. They look them over once in a while—is that in the shipping room?

A. At the cutting where an Inspector will—

Q. (Interrupting.) In the cutting factory?

A. In the factory; yes.

Q. They inspect before the cutting?

A. No, sir; I don't think so.

Q. They inspect after the cutting?

A. After the cuts are made.

Q. You say they may look the leather over?

A. I think they just want to look at it to get a general idea. As a matter of fact, we used to ask them to look at it to see how it was running, but they never made an actual inspection.

285 Q. Now you received notification when a contract has been awarded—a Government contract?

A. Yes.

Q. And you then operate under that Government contract, so far as supplying the necessary leather needed for that contract?

A. Yes, sir.

Mr. KEEZER. Just one moment, please, Your Honor. (Pause for a few minutes.) I think that completes my cross-examination.

Redirect examination by Mr. SWARTWOOD:

Q. I have just a couple questions, Mr. Clark. Please state whether or not the same process is used in tanning Government leather that is used for commercial leather, up through the "Blue" Department.

A. Yes, it is.

Q. Now referring to this tag which is placed on the leather after the buffing machine process—is that a paper tag?

A. Yes.

Q. Does it contain a number?

A. We usually designate each color by number.

286 Q. Does that number refer to any Government contract?

A. No, sir. Civilian tags are all by number too.

The COURT. That number is to designate the quality?

The WITNESS. The color, sir. For instance, we have a color, we say, two twenty, that designates a certain color, and when it gets to the finishing room the man knows what color to put that into.

By Mr. SWARTWOOD:

Q. You stated a Government Inspector in the factory—you mean in the shoe factory?

A. In the shoe factory.

Q. Where the Government shoes are made?

A. Yes, sir.

Q. Now Mr. Kreeger asked you that after you received—if after you received notice of award, you operated the tanneries to produce Government leather. State whether or not the leather runs along through this process up to the "Blue" in the same way for commercial shoes as it does for Government shoes, up to that "Blue" Department, and after the notice of award?

A. Yes, it is made exactly the same for civilian as for army use.

287 Q. You are not operating tanneries for Government awards?

Mr. KREEGER. I think that calls for a conclusion.

The COURT. Sustained.

Mr. SWARTWOOD. I withdraw the question.

The COURT. One question—I think the attorneys can tell me that. Mr. Clark has spoken about Inspectors in the footwear factory. Now, am I right in my understanding that there was a Government Inspector there all the time during the performance of this contract?

Mr. KREEGER. I don't have any information on that. Perhaps Mr. Clark can tell us.

Mr. SWARTWOOD. I can answer that. There were Government Inspectors at "George F. Tabernacle" and "Scout" where they were making the leather into shoes, during the contract—that is in the footwear, but not in the tanneries.

The COURT. I know, but I had gathered yesterday there were the Inspectors that came along, like Mr. Roller and Mrs. Hogue, occasionally; that made the inspection. In addition to Mr. 288 Roller and Mrs. Hogue, was there a resident Inspector that stayed there?

Mr. KREEGER. Not under the Walsh-Healey Act, Your Honor.

The COURT. I don't mean under the Walsh-Healey Act.

Mr. KREEGER. You mean under the contract?

The COURT. Under the contract, was there a Government Inspector there?

Mr. SWARTWOOD. For the purpose of inspecting the shoes; yes, sir. The inspection of Mr. Kreeger did not come until long after the contract was performed.

The COURT. As I understand it, I think this department Mr. Kreeger is representing were not interested in the workmanship or the quality of the shoes?

Mr. KREEGER. That is it exactly.

The COURT. Only interested in the conditions under which they were being made?

Mr. KREEGER. That is it exactly, Your Honor.

Mr. SWARTWOOD. The Inspectors Mr. Clark mentioned are the Inspectors interested in the shoes, and they are only in the shoe factory.

Re-cross-examination by Mr. KREEGER:

289 Q. Mr. Clark, you stated part of the time your employees may be working on a batch of the Government leather, and part of the time for civilian wear; one hour on this batch, and one hour on that?

A. Correct.

Q. After the Government contract has been awarded, and until its completion, do the employees in the tanneries work part of the day on Government hides every day?

Mr. SWARTWOOD. That is objected to on the same ground as before; not within the issues of the hearing, and attempting to show violations.

The COURT. Overruled—he may answer.

Mr. SWARTWOOD. Exception.

The WITNESS. Repeat the question, please?

By Mr. KREEGER:

Q. During the period when a Government contract is being performed, and you are tanning the leather for the Government contract, as well as civilian shoes, do the employees of the tanneries work part of the day, or some part of the day, on the Government hides?

A. Not all of them wouldn't—no, sir.

Q. But with respect to those Government hides, you stated some employees may work one hour on Government and
290 one hour on civilian?

A. That is correct.

Q. Would there be a period of several days or more during the performance of the contract when nothing whatever would be

done on the Government hides, or is something done every day on the performance of the Government contract?

A. Something done every day.

Mr. KEEGER. That is all, Mr. Clark.

HERBERT U. SCHENCK, called as a witness in behalf of the Defendants, and being duly sworn, testified as follows:

Direct examination by Mr. SWARTWOOD:

Q. Mr. Schenck, where do you live?

A. Endicott.

Q. And what is your connection with the Endicott Johnson Corporation?

A. I am Assistant Superintendent of the Calf Skin Tanneries.

Q. You work under Mr. Ralph Clark?

A. Yes, sir.

291 Q. Do you recall an occasion in 1938, when you conducted Mrs. Mary Hogue, who sits in the courtroom, through the Calf Skin Tanneries?

A. Yes, sir.

Q. On this date that you conducted her through the Calf Skin Tannery, did you and Mrs. Hogue stop in the "Blue" Department?

A. No, sir.

Q. Were there on that occasion any men placing Government stamps on shoes, on the hides in the "Blue" Department in the Calf Skin Tannery?

A. No, sir.

Q. Has there ever been any Government Inspectors placing stamps, or making selections of hides, in the Calf Skin Tannery?

A. No, sir.

Q. Yesterday, Mrs. Hogue testified that in the "Blue" Department a blue stamp was being placed on the hides in the "Blue" Department, marked "Gov't" or "GC". Is that or is that not a fact?

A. No, sir; it is not a fact. It is impossible.

Q. Why is it impossible?

292 A. As Mr. Clark stated, it wouldn't stay on. It would wash off, or be covered up with the dyes.

Q. On this occasion, when you took Mrs. Hogue through the Calf Skin Tanneries, were employees of the Endicott Johnson Corporation punching holes in the hides in the "Blue" Department?

A. Yes, sir; they are every day—every working day.

Q. But you didn't stop at that Department?

A. No, sir.

Mr. SWARTWOOD. I think that is all.

Mr. KREGER. No cross-examination.

The COURT. That is all.

GEORGE DENNIS, called as a witness in behalf of the Defendants, and being duly sworn, testified as follows:

Direct examination by Mr. SWARTWOOD:

Q. Mr. Dennis, where do you live?

A. I live at 1702 Whetherell Street, Endicott.

Q. What is your connection with the Endicott Johnson Corporation?

A. I am Superintendent of the Upper Leather Tanneries.

Q. At Endicott?

A. At Endicott.

293 Q. What was your position in November, 1938 with regards to the tanneries?

A. I was superintendent then.

Q. Now do you recall an occasion when Mrs. Hogue, the lady sitting in the front row here, went through the Upper Leather Tanneries with you?

A. Yes; I do.

Q. Do you recall about when that was?

A. Sometime in November 1938—the latter part.

Q. When you took Mrs. Hogue through the Upper Leather Tanneries did you and she stop at the "Blue" Department in the Upper Leather Tanneries?

A. We went through there.

Q. Did you stop there?

A. No.

Q. You have heard Mr. Clark's description of what happens in the "Blue" Department in relation to the punching of hides?

A. Yes, sir.

Q. Were men working there that day, when Mrs. Hogue went through, putting punch holes in the hides?

A. Yes, sir.

Q. Yesterday Mrs. Hogue stated that in the "Blue" Department the Government Inspectors were placing blue stamps on the hides in the "Blue" Department. Is that or
294 is that not a fact, as to the Upper Leather Tanneries?

A. We have never used a blue stamp there.

Q. Ever use any stamp there?

A. No, sir.

Q. Was any marking of the Government hides, other than these punch holes, ever made in the Upper Leather Tanneries?

A. No, sir.

Q. Has there ever been any Government Inspectors selecting hides in the Upper Leather Tanneries at Endicott?

A. No, sir; there never have.

Mr. SWARTWOOD. That is all.

Mr. KREGER. No cross-examination.

The COURT. That is all.

PAUL R. KNICKERBOCKER, called as a witness in behalf of the Defendants, and being duly sworn, testified as follows:

Direct examination by Mr. SWARTWOOD:

295 Q. Mr. Knickerbocker, where do you live?

A. 309 Lillian Avenue, Endicott, New York.

Q. And what is your connection with the Endicott Johnson Corporation?

A. Superintendent of the Sole Leather Tannery.

Q. And what was your connection in the fall of 1938?

A. Same position.

Q. Mr. Clark has described to the Court the various processes in the tanning of upper leather in the Upper Leather Tanneries, and, also, in the Calf Skin Tanneries. Will you describe briefly the various steps in the tanning of sole leather in the Sole Leather Tannery?

A. The hides are first washed, and then split, and stamped with numbers.

Q. With numbers?

A. Numbers.

Q. What are those numbers for?

A. To keep track of the different kind of hides for "yield" purposes.

Q. "Yield?"

A. "Yield."

The COURT. What does that mean?

296 The WITNESS. That tells how much you gain or lose in the various kinds of hides.

By Mr. SWARTWOOD:

Q. In other words, you keep track of the numbers to show whether or not the hides are shrinking more than other hides?

A. Whether they are the same, more or less, when finished. Then they go through the soaking, the lime, the sulphite, the same as the Upper Leather Tannery, and from there they go into a "baiting" solution.

Q. "Baiting?"

A. "Baiting." And from there to the tanning—the vegetable tanning, the bark, etc., and from that process, next is the wringing,

taking out about fifty percent of the moisture, and from there to the oiling.

Q. Oiling?

A. Oiling—and then it is dried, and then it is reoiled again, and then sent back in and put through the setting machines, and then dried again, and then finished with oils and compounds—no dyes—and from there to the shipping room.

297 Q. The Upper Leather which Mr. Clark described is chrome tanned leather?

A. That's right.

Q. And the sole leather you are describing is vegetable tanned leather?

A. Yes, sir.

Q. Now after the leather reaches—the sole leather reaches the shipping room what occurs?

A. Well, it is there gauged for “iron” or thickness, such as light, medium, or heavy.

Q. For the benefit of the Court, what is an iron? Is it $\frac{1}{48}$ inch?

A. That is right.

Q. Now what is designated as a light sole leather, according to irons?

A. Seven and a half iron and down is light; and eight to eight and a half iron is medium; and nine iron and up is heavy.

Q. What thickness of sole leather is used in the manufacture of Government shoes?

A. The heavy.

Q. That is nine and a half iron?

A. Nine iron and up.

298 Q. Nine iron and up?

A. Yes.

Q. State whether or not the same process of tanning sole leather is used in the making of sole leather for civilian shoes, and sole leather for Government shoes?

A. It is all the same.

Q. Is there any selection of any kind made with respect to sole leather, in the Sole Leather Tannery, to designate it for Government shoes?

A. No, sir.

Q. Now after the leather is piled—the sole leather is piled in the shipping room, state how it then goes to the factory.

A. It goes to the factory in these designated irons, or thicknesses, and from there it is cut into soles, and goes through these leveling machines, and from there the leather is sorted. The—

Q. (Interrupting.) I think that answers it, Mr. Knickerbocker. When the factory orders sole leather from your sole leather shipping room, how does it put in the order?

A. By irons.

299 Q. So many sides of such an iron?

A. That is right. So many pieces of leather at such an iron, and they may say the sumber of the lot; the number we put on in the first part of the tannery, which designates the kind of hide, big or small, or whatever it may be.

Q. Now after the heavy sole leather reaches the factory, into what department of the shoe factory does it go?

A. The sole cutting.

Q. The sole cutting department?

A. The sole cutting.

Q. What happens to the leather in the sole cutting department.

A. There it is cut up into soles, and graded for iron, and then it is sorted out, the best for Government work, and the Government man is there to sort it.

Q. When you say it is cut into soles—it is cut into different sizes you mean?

A. That's right.

Q. After the sole leather is cut into different size soles, is there some inspection made by employees of the Endicott Johnson Corporation?

A. Yes, sir.

300 Q. What do they do with it?

A. They sort it out for surface—that is out of my department, but the best of my recollection is they check for surface and quality and iron.

Q. And after they have made their selection is there a further selection made with respect to Government shoes?

A. Yes; the Government Inspector re-sorts it.

The COURT. That is in the sole cutting room?

The WITNESS. The sole cutting department—yes sir.

By Mr. SWARTWOOD:

Q. The Government Inspector in the sole cutting department—does he place a stamp on the soles he selects for Government use?

A. Yes, sir.

Q. Is that, to your knowledge, the only time that the sole leather is ever sorted or selected by an Inspector of the United States Government?

A. Yes, sir.

Mr. SWARTWOOD. That is all, Mr. Knickerbocker.

301 Cross-examination by Mr. KREEGER:

Q. Sorry, I didn't get your name?

A. Paul R. Knickerbocker.

Q. Mr. Knickerbocker, you are the Assistant Superintendent?

A. Superintendent.

Q. Of the Sole Leather Tanneries?

A. Yes, sir.

Q. Where do you receive your instructions, or your directions, about what kind of leather to tan, and how much of a particular size, or kind, or quality of leather to tan?

A. Our Schedule is made out in the main office.

Q. Does that show for what purpose the leather will be used?

A. No, sir.

Q. You are just told to tan so many hides, such and such a thickness?

A. No; not at that point. Just tan such and such hides.

Q. Such and such hides. Are you instructed how to tan—the method that should be used?

A. The method is all the same.

Q. All the same? Mr. Knickerbocker, I am reading you now from certain specifications made by the Government contracts, "Outer soles to be nine iron or greater in thickness and to be cut from best oak or union tanned leather, made from green salted hides of best quality, fully tanned with the best materials and without the use of mineral acid. Free mineral acid content of all finished sole leather shall be not more than one percent. No hemlock-tanned leather will be accepted." Does the leather produced in your tannery, for the soles, comply with that requirement?

A. Yes, sir.

Q. Another set of specifications provides "Middle Soles shall be full length, seven iron, and cut from full-grain oak or union-tanned leather, made from fine-haired green-salted hides. Middle soles to be number one shoulder quality, free from brands, cuts, or holes, properly fleshed before inspection." Does the leather tanned in your factory comply with that requirement?

A. We make no selection there. It is as it leaves our factory?

Q. Up to selection?

A. Yes.

303 Q. All soles nine irons thick, cut from best oak, made from green salted hides, fully tanned with best materials, without the use of mineral acid?

A. Yes, sir.

Q. Do you treat leather without acid?

A. Without mineral acid up to one percent, you said?

Q. This said without the use of mineral acid. Does your process meet that requirement?

A. Yes, sir.

Q. Now you testified as to different sortings of soles for the Government shoes and boots. The first sorting occurs when?

A. We have no first sorting.

Q. You testified there was a sorting of soles for Government shoes?

A. In the factory after it leaves our department is the only time.

Q. After the leather is tanned, and sent to the sole cutting department?

A. That's right.

Q. Where are the soles cut?

A. At the factory.

Q. Where do they make the shoes?

A. Endicott and Johnson City.

304 Q. That is where they make the soles, you say?

A. Yes, sir.

Q. You say the Government Inspector inspects the soles before they are used?

A. Yes.

The COURT. The sole cutting is done in the "George F. Tabernacle" Factory, and others, or is there a particular place where the sole cutting is all done?

The WITNESS. There is one in Endicott and one in Johnson City. I think it is the Victory Factory in Johnson City.

By Mr. KREEGER:

Q. Is there sole cutting done in the "George F. Tabernacle" Factory?

Mr. SWARTWOOD. I can clear this up, Your Honor. The sole cutting departments are one at Johnson City, and one at Endicott. They are in the shoe factories, but they cut soles for all the factories.

The COURT. I see.

By Mr. KREEGER:

305 Q. Is a stamp put on the soles after the first sorting by the Government Inspector?

A. What he accepts, yes.

Q. What he accepts he stamps with a Government stamp?

A. Yes.

Q. When is the second sorting?

A. There is only one I know of.

Q. Is that after the cutting or before?

A. After.

Q. You testified there was a further sorting by the Government Inspector, or did you mean to testify to one act of sorting?

A. I only intended to testify to one sorting.

Q. Sorted for use under the Government contract?

A. Yes.

Mr. KREEGER. That is all.

Mr. SWARTWOOD. Just a minute!

Redirect examination by Mr. SWARTWOOD:

Q. In connection with the specifications which Mr. Kreeger read from the army contracts, state whether or not vegetable tanning means tanning without the use of mineral acid?

306 A. Would you let me have that again, please?

Q. Does vegetable tanning mean tanning without mineral acid?

A. No.

Q. Well, are all of the hides which you use—well, state the kinds of hides you use in making sole leather as to whether they are green salted or dried.

A. We use all kinds of hides.

Q. Now how long is the process of making sole leather, from the time you take the raw hide until it is finally put in the shipping room?

A. About sixty-five days.

Q. Now when the Endicott Johnson Corporation receives a notice of award of a contract, where do they get the leather to be used in those Government shoes during the period of sixty-five days which elapses from the time of the soaking of the hide until the tanning process is completed?

Mr. KREEGER. I object to that, Your Honor. This witness has not testified to any knowledge concerning Government contracts. He testified he received directions from the main office as to leather and hides to make. He stated nothing—

307 The COURT (interrupting). That's right (to Mr. Swartwood). I think you will have to show this from someone else. I understood him to say there were no contracts designated. He just had to tan so many hides.

Mr. SWARTWOOD. Let me ask this question. Maybe this will straighten it out.

By Mr. SWARTWOOD:

Q. During the period when the Endicott Johnson Corporation is performing a Government contract, where do you get your leather?

Mr. KREEGER. That is objected to for the same reason.

Mr. SWARTWOOD (continuing above question). Sole leather?

Mr. KREEGER. The witness hasn't shown he received any information.

The COURT. During that period—overruled. He may answer.

The WITNESS. It comes from the shipping department.

By Mr. SWARTWOOD:

Q. And the leather is made up in advance of the notice of award?

308 A. Yes, sir.

Mr. SWARTWOOD. That is all.

Recross-examination by Mr. KREEGER:

Q. Mr. Knickerbocker, how do you know a Government contract has been awarded?

A. I usually don't, until I see it in the paper or somebody tells me about it. I get no notice.

Q. You get no notice of Government contracts?

A. No.

Q. So you don't know if you are working on a Government contract or not?

A. I know when they are making Government shoes some of the leather goes into those shoes.

Q. You start making all kinds of hides?

A. Yes, sir.

Q. Green salted hides?

A. Yes, sir.

Q. Your technical knowledge is superior to mine. "Best oak or union tanned"—differentiate that from the other leather you use.

A. No difference.

309 Q. That describes all the leather you use?

A. It is all tanned in the same way.

The COURT. From leather.—

The WITNESS (interrupting). Same method or material.

By Mr. KREEGER:

Q. You use other than green or best quality hides?

A. Sometimes dried.

Q. As well as green salted?

A. Yes, sir.

Q. You are notified how many green salted to use, and how many dried?

A. That is designated by the stamp in the earlier process.

Q. How do you know how many to make?

A. We have a schedule made up from the office.

Q. When you receive your informal or newspaper information about Government contracts, do you find that at that time you begin to make many more green salted hides than you would ordinarily?

A. Yes; dry hides are way in the minority. We don't usually tan dry hides.

The COURT. You don't tan many dry hides?

310

By Mr. KREEGER:

Q. I am referring to the period you know Government contracts have been awarded—you find your use of green hides increased?

Mr. SWARTWOOD. I object to that as speculative.

Mr. KREEGER. I don't think this is speculative.

Mr. SWARTWOOD (to Mr. Kreeger). You just convinced the Court he doesn't know about Government contracts, and now you want him to testify about green salted hides.

The COURT. He may answer if he knows.

Mr. SWARTWOOD. Exception.

The WITNESS. Not necessarily.

By Mr. KREEGER:

Q. That is, at the time when you are not working on Government contracts, you may be making the same kind of green hides?

A. Yes.

Q. Green hides are a major portion of the tanning production at all times?

A. Yes, sir.

Mr. KREEGER. That is all.

311

Redirect examination by Mr. SWARTWOOD:

Q. Mr. Knickerbocker, when you start tanning these hides, you have a stamp, do you not, which designates which is a dry and which is a green hide?

A. Yes, sir.

Q. After these hides have been fully tanned, do you pile them up in the shipping room so you have green salted hides in one pile, and the dry hides in another pile?

A. Yes, sir.

Q. And if the Endicott Johnson Corporation was performing a Government contract, from which pile would you take the sole leather?

Mr. KREEGER. I object to that, Your Honor.

The COURT. Sustained.

By Mr. SWARTWOOD:

Q. Well, if the sole cutting department asked you to send over heavy leather for Government shoes, which pile would you take the sole leather from?

Mr. KREGER. I object to that, Your Honor.

The COURT. Sustained.

312 Mr. SWARTWOOD. I think that is all, Mr. Knickerbocker.

Well, if Your Honor please: I think we have put in the evidence in accordance with your suggestion in the opinion, and if you have no further questions we will rest.

The COURT. Well, I would like—and I presume you people can—you attorneys can tell me in a brief statement or stipulation, as to the carton factory. I assume they make the cartons. I don't know if they manufacture the material, or just fashion them.

Mr. SWARTWOOD. We simply fashion the cartons from material which we purchase, called chip board. They are run from machines, and from these boxes—

The COURT (interrupting). Those are the large boxes? Those are not the individual shoe boxes?

Mr. SWARTWOOD. They are the individual shoe boxes.

The COURT. Individual shoe boxes?

Mr. SWARTWOOD. Yes, and that is the department referred to as the carton department.

The COURT. That is in a separate building?

313 Mr. SWARTWOOD. Yes, sir. One of those departments is in Johnson City, and one in Endicott, and they make cartons for all of the shoe factories, not for any one particular factory.

The COURT. These shoe factories would send for a certain number and a certain size?

Mr. SWARTWOOD. That's right, and there is no difference so far as I know in the cartons we use for Government shoes and the cartons we use for civilian shoes.

Mr. KREGER. If the Court please: May I call Mr. Grogan back for one or two questions?

The COURT. One other thing—

Mr. SWARTWOOD (interrupting). I think that is mostly covered by the Plaintiff's Exhibit thirteen, which is the testimony dated December thirteenth.

The COURT. Does that also cover the counter department?

Mr. KREGER. I think it does. The answer admits they made all the counters for all Government shoes.

The COURT. Does it show where?

Mr. KREEGER. It doesn't show where. It does show they made them all.

314 Mr. SWARTWOOD. I know it sets up all the counters made in the Government contracts were made in the counter department at Johnson City. That is the only counter department which we have.

The COURT. Would you two be able to agree upon a brief statement as to regarding the making of those, and so on, if Mr. Swartwood, in a few words, tells of the operations there! (to Mr. Swartwood). Are you familiar enough with it so you could say it was covered?

Mr. KREEGER. That all depends. I would be willing to stipulate the Defendant corporation; in its counter department, goes through the necessary operations to make counters, which they sell.

The COURT. All I am interested in is the nature of the making of the counters.

Mr. KREEGER. I have no objection to the manner in which they are made (to Mr. Swartwood). Do you have a witness who could testify to that?

Mr. SWARTWOOD. Not here, no sir. The counters for
315 Government shoes are made out of sole leather, and it is my understanding blanks are cut from a pattern, and then they are moulded so that they form this round hard part that is in the back of the shoe, and we make the counters for the Government shoes and the counters for the civilian shoes in the counter department in Johnson City at the same time, by the same employees. It is a separate department not connected with any shoe factory.

The COURT. Any that have to be selected, or are they just made to the size of the shoes?

Mr. SWARTWOOD. The Government shoes contain a sole leather counter, and I think there are only a few classes of civilian shoes which contain a sole leather counter. Most of them are made from counter-board, which is made of chemically treated paste-board, or leather board. That point is also covered in the Plaintiff's Exhibit number thirteen, as to those particular operations, in a full description.

316 WILLIAM B. GROGAN, recalled as a witness in behalf of the Government, testified as follows:

Direct examination by Mr. KREEGER:

Q. Mr. Grogan, you have testified as to a number of conferences and discussions with Mr. Swartwood and Mr. Johnson, and I believe others, although I believe Mr. Swartwood and Mr. John-

son were the ones you referred to in connection with the Endicott Johnson contracts involved. Will you state whether or not at any time you stated to Mr. Swartwood or Mr. Johnson that in your opinion the tanneries or the rubber mills, or the sole-cutting departments, or the counter department, or the carton department, were not, as a matter of law covered by the Walsh-Healey Act, or would not, as a matter of equity be covered by the Walsh-Healey Act?

Mr. SWARTWOOD. I object to that question as not within the issues laid down, but comes in the evidence of that character excluded yesterday. I based my definition this morning
317 on your suggestions, and avoided bringing Mr. Johnson over here because I thought that type of evidence was to be excluded.

The COURT. As I recall some matters not before me, that question came up, or there was some statement in regard to that. That is not in this proceeding.

Mr. KREBGER. That is true, Your Honor—

The COURT (interrupting). So that this would be purely negligible testimony.

Mr. KREBGER. Not precisely. When I introduced a transcript of the Administrative Hearing I stated I was interested particularly in a few pages because I realized under Your Honor's ruling many pages would be irrelevant. I entirely agree my question would be irrelevant if it were not there was something in the record, but the record shows on page forty-four, "Also Mr. Grogan stated that the equities of the situation were with us"—testimony of Mr. Swartwood—"because all the contracts
318 had long since been performed and because the question of the tanneries and rubber mills had not been raised by the Division or any of its representatives during the period of their performance, up to June or July, 1938." I would be willing to have that particular part of the Administrative Hearing withdrawn, and I will withdraw my question.

The COURT. No materiality there.

Mr. KREBGER. I don't think there is, and—

The COURT (interrupting). And I assume Mr. Swartwood would just as soon it be withdrawn in this case. Certainly there is no materiality.

Mr. SWARTWOOD. I think we can clear that up.

The COURT. You could stipulate those pages are not in evidence.

Mr. KREBGER. That would be entirely satisfactory. There are two or three references to conferences with Mr. Grogan. It is to that—

The COURT (interrupting). You read it over. The Court will recess for about three minutes. I think we can eliminate that part from the record.

(Recess taken for three minutes. Case resumed after recess, same date and place.)

319 Mr. SWARTWOOD. If Your Honor please: In view of the fact that Mr. Charles F. Johnson, Jr., is not present to testify this morning; I am willing to concede the Plaintiff be permitted to withdraw from the record the following portions of Plaintiff's Exhibit thirteen in evidence: Page forty-four of the testimony; page forty-nine of the testimony; page fifty of the testimony; page fifty-one of the testimony, and page fifty-three of the testimony, insofar as they relate to conferences and conversations between Messrs. Swartwood and Johnson, representing the Endicott Johnson Corporation, and Messrs. Grogan, Walling, and Grant, representing the Division of Public Contracts.

Mr. KREEGER (to Mr. Swartwood). Will you read those pages again, Mr. Swartwood?

Mr. SWARTWOOD. Forty-four; forty-nine; fifty (pause).

Mr. KREEGER. Next.

Mr. SWARTWOOD. I say insofar as they relate to conversations.

Mr. KREEGER. Fifty-one?

320 Mr. SWARTWOOD. Fifty-one is right.

Mr. KREEGER. And fifty-three?

Mr. SWARTWOOD. Yes—part of it doesn't refer to conferences. I say insofar as they refer to conferences and conversations.

Mr. KREEGER. That is satisfactory, Your Honor, and I have no further questions.

The COURT. What exhibit is that?

Mr. KREEGER. That is exhibit thirteen.

Mr. SWARTWOOD. Plaintiff's Exhibit thirteen in evidence.

The COURT. May I ask this: Does Plaintiff's Exhibit thirteen cover the operations of your so-called rubber factories?

Mr. SWARTWOOD. Yes, sir.

The COURT. So that I can get from that a general idea of the method of operation of the rubber mills?

Mr. SWARTWOOD. In connection with that the answer is yes, and it was because of that I didn't produce any witnesses.

The COURT. All right.

Mr. KREEGER. Will you, Your Honor, hear a motion?
321 the testimony has been closed. Your Honor, I should like to move that on the pleadings before Your Honor, the complaint and application, and the answer, and on this hearing that has just been held, that Your Honor grant an order enforcing the subpoenas as requested in the complaint and application, on the ground that this hearing has failed to establish any basic

issue of law or fact which would sustain a denial of the subpoenas in that the uncontradicted evidence is that the Defendant Corporation made its leather, rubber, and other parts that were used in the manufacture of Government shoes, and to that extent employed employees engaged in the manufacture of material used in the performance of the Government contracts, which is the standard established in the Walsh-Healy Act, and since our subpoenas ask for the books and records covering such employees, it is our contention on the undisputed facts, that we are entitled to an order enforcing the subpoenas.

The COURT. I will reserve decision.

322 Mr. KREEGER. One further motion, Your Honor. I would like to phrase it as a request rather than a motion. As Your Honor ruled, this is a summary proceeding, and I am not sure to what extent an exception has been taken, as you made the rulings. I wondered whether Your Honor would concede for the sake of the record that the Defendant and the Plaintiff reserve an exception on every ruling contrary to their contentions.

The COURT. You mean in the testimony that has been put in?

Mr. KREEGER. Yes.

The COURT. If you have inadvertently failed to take an exception to any adverse ruling, I will hold that you are entitled to it, and may have the benefit of an exception, the same as though you had taken it at the time.

Mr. KREEGER. Thank you.

Mr. SWARTWOOD. That same thing apply to us?

323 The COURT. That applies to both sides. Now do you want to submit this as it is, or does each side want to file a brief?

Mr. KREEGER. I should like to file a brief. I have one half finished now.

The COURT. Each file a brief and exchange them, and each have an opportunity to reply?

Mr. KREEGER. I think that would be satisfactory.

Mr. SWARTWOOD. At the conclusion of the hearing at Malone, it was agreed the Plaintiff should have ten days following the conclusion of the hearing in which to serve a brief on the Defendant, and the Defendant would have an equal time to file a reply brief.

The COURT. Answering brief?

Mr. SWARTWOOD. Answering brief, and, then, if any reply brief was required by the Plaintiff, he would have five days, and I would have an equal five days.

Mr. KREEGER. That time schedule was made in the light of a shorter record. I understand Mr. Arnot is not going to get it transcribed within a week. I would be willing to do this—

The COURT (interrupting). Mr. Kreeger, I don't want to
324 inconvenience you on time. I want to keep it down to as short a time as I can without inconveniencing you, because I know this is not the only matter you have charge of, so I will give you as long a time as you feel is necessary after the receipt of the stenographer's minutes.

Mr. KREEGER. Well, ten days would be sufficient after the receipt of the stenographer's minutes, subject to our requesting an extension. Mr. Swartwood has been very co-operative.

Mr. SWARTWOOD. We are in no hurry, Judge.

The COURT. What is that?

Mr. SWARTWOOD. We are in no hurry.

Mr. KREEGER. But unfortunately I am.

The COURT. Let us say then, ten days after you receive the minutes you will serve a brief on Mr. Swartwood.

Mr. KREEGER. That is all right.

The COURT. And Mr. Swartwood will serve an answering brief within ten days.

Mr. KREEGER. Ten days after receipt of mine?

Mr. SWARTWOOD. Yes.

The COURT. And five days necessary for a reply.

325 Mr. KREEGER. If one is necessary.

The COURT. If one is necessary.

Mr. SWARTWOOD. And if Mr. Kreeger isn't able to serve his brief within ten days after receipt of the minutes, I shall gladly extend the time, if I have ten days after I receive his.

Mr. KREEGER. Thank you.

The COURT. Recess until two o'clock. One other thing, will each attorney keep his exhibits and submit them when submitting his brief?

Mr. KREEGER. His own exhibits? I don't understand, Your Honor.

The COURT. Do you want the exhibits filed with the Clerk now? will the attorneys want to keep the exhibits to, perhaps, use in the making of the briefs, and then submit them to the Court with the briefs?

Mr. SWARTWOOD. I understand that is customary under the rules. I do understand, however, from the stenographer, this morning, that we have used some terms not familiar, and he felt if he
326 could retain the exhibits until he transcribed the minutes they might be of assistance, so I am willing he have the exhibits, and return them to me with the transcript of the minutes.

Mr. KREEGER. That would be satisfactory, when we get the minutes for the stenographer to send the exhibits.

Mr. SWARTWOOD. It may be possible we will have to correct some of the words in the transcript before we complete the record.

The COURT. Well, I will tell the stenographer he had better ask someone that knows more about tanning than I do [laughter].

Mr. KLEBERGER. Or I.

Adjournment taken at 12:30 P. M.

EXHIBITS AT HEARINGS OF APRIL 24 AND 25, 1941

327

Plaintiff's Exhibit 1-B

Contract No. W-155-qm-ECW-66 Office Identifying No. 834

CONTRACT

(SUPPLIES)

War Department, Q. M. Corps

(Department)

Endicott Johnson Corporation

(Contractor)

Contract for shoes, service, special types "B" & "E." Amount, \$759,801.72. Place, Boston Quartermaster Depot, Boston, Massachusetts.

328

CONTRACT FOR SUPPLIES

This Contract, entered into this 10th day of November 1936, by the United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and

ENDICOTT JOHNSON CORPORATION

a corporation organized and existing under the laws of the State of New York, of the city of Endicott, in the State of New York, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Scope of this contract.—The contractor shall furnish and deliver to the Government, the articles described and upon the terms and conditions set forth in the Schedule of Supplies attached hereto and by reference made a part hereof, for the consideration stated Seven Hundred Fifty-nine Thousand Eight Hundred and One Dollars and Seventy-two Cents (\$759,801.72) in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof and designated as follows:

Schedule of Supplies, Q. M. C. Form 300.

Standard Government Form of Invitation for Bids No. 39 (ECW 155-37-57), dated October 29, 1936.

Amendment No. 1, dated October 24, 1936, to Invitation for Bids No. ECW 155-37-57.

Standard Government Form of Bid No. 31 (ECW 155-37-57).

329

SPECIFICATIONS

Tentative U. S. Army Specification "B" for Shoes, Service, Special Type "B," With Full Middle Sole and Rubber Heel, for Civilian Conservation Corps, dated September 3, 1935, as modified by Amendment No. 1, dated October 24, 1936, to Invitation for Bids No. ECW-155-37-57.

Tentative U. S. Army Specification "E." for Shoes, Service, Special Type "E," with Corded Rubber Sole and Uncorded Rubber Heel, for Civilian Conservation Corps, dated September 21, 1935, as modified by Amendment No. 1, dated October 24, 1936, to Invitation for Bids No. ECW-155-37-57.

Shoes, Service, U. S. Army Specification No. 9-6E, dated March 5, 1934.

Leather; Sole, Vegetable-Tanned, Federal Specification No. KK-L-261a, dated June 4, 1935.

Thread; Linen, Federal Specification No. V-T-291a, dated October 3, 1933.

Heels; Rubber, Federal Specification No. ZZ-H-141, dated September 4, 1934 (insofar as applicable).

Rubber Goods; General Specifications, Federal Specification No. ZZ-R-601, dated February 4, 1930.

Boxes; Fiber, Corrugated, Federal Specification No. LLL-B-631a, dated April 28, 1936.

Boxes; Fiber, Solid, Federal Specification No. LLL-B-636a, dated April 28, 1936.

Standard Specifications for Marking Shipments, U. S. Army Specification No. 100-2D, dated February 4, 1933, as amended by Amendment No. 1, dated July 6, 1936.

330 Article 18—Representations and Stipulations Pursuant to Public Act No. 846, Seventy-fourth Congress:

(a) The contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

(b) All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equip-

ment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: Provided, however, That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

(c) No person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

(d) No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

(e) No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings, or under working conditions which are insanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part hereof is to be performed shall be prima-facie evidence of compliance with this subsection.

(f) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of \$10.00 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deduction, rebates, refunds or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into
331 the contract shall have the right to cancel same and to make

open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deduction, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

(g) The contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

(h) The foregoing stipulations shall be deemed inoperative if the contract is for a definite amount not in excess of \$10,000.00.

(i) Employees affected.—When operative, the stipulations shall be deemed applicable only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract and shall not be deemed applicable to office or custodial employees.

(j) Overtime.—When the stipulations herein are operative, employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 8 hours in any one day or in excess of 40 hours in any one week, provided such persons shall be paid for any hours in excess of such limits the overtime rate of pay which has been set therefor by the Secretary of Labor.

Until otherwise set by the Secretary of Labor, the rate of pay for such overtime shall be one and one-half times the basic hourly rate or piece rate received by the employee.

If in any one week or part thereof an employee is engaged in work covered by the contractor's stipulations, his overtime shall

be computed after 8 hours in any one day or after 40 hours in any one week during which no single daily total of employment may be in excess of 8 hours without payment of the overtime rate.

(k) Records of employment.—Every contractor subject to the stipulations herein contained shall maintain the following records of employment which shall be available for the inspection and transcription of authorized representatives of the Secretary of Labor:

332 (1) Name, address, sex, age, and occupation of each employee covered by the contract stipulations.

(2) Wage and hour records for each such employee including the rate of wages and the amount paid each day period, the hours worked each day and each week, and the period during which each such employee was engaged on a Government contract with the number of such contract.

Such records shall be kept on file for at least one year after the termination of the contract.

(l) Such other provisions of Public Act No. 846, 74th Congress, and of U. S. Department of Labor Regulations No. 504, dated September 14, 1936, as are pertinent, shall be applicable to this contract.

(m) Inasmuch as the Department of Labor has made no determination of minimum wage for the Shoe Industry, subparagraph (b) of this article is declared inoperative and shall not apply to this contract.

333 War Department—Q. M. C. Form 309—Authorized Nov. 16, 1927.

SCHEDULE OF SUPPLIES

Must be filled in and attached to all Quartermaster Corps contracts for supplies

1. Contract number and date, W-155-qm-ECW-66 (O. I. 334) dated Nov. 10, 1936.

2. Contracting officer, name, Ira K. Evans, Captain, Q. M. Corps, U. S. A. Address, Boston Quartermaster Depot, Army Base, Boston, Mass.

3. Contractor, name, Endicott Johnson Corporation. Address, Endicott, New York.

Factory name and location, "George F. Tabernacle Factory," Binghamton, New York.

4. F. O. B. delivery and inspection points. See Paragraph 5 below.

5. Articles or services: Shoes, Service, Special Type "B," and Shoes, Service, Special Type "E."

Quantity	Unit	Description and specification	Unit price	Total
Item No. 1: 133,524	Pairs	Shoes, Service, Special Type "B" with full middle sole and rubber heel.	\$2.51	\$335,145.24
Item No. 2: 182,256	Pairs	Shoes, Service, Special Type "E" with corded rubber sole and un-corded rubber heel.	2.33	424,656.48

Contractor to furnish one pair of shoe laces with each pair of shoes without additional cost to the Government.

334 Standard Form No. 31.
Approved by the President.
June 10, 1927.

Bid No. _____

ECW-155-37-57

STANDARD GOVERNMENT FORM OF BID

Office

(SUPPLY CONTRACT)

Opening Date for this Bid—11:00 A. M., November 9, 1936.
(Eastern Standard Time)

Place, Endicott, New York
Date, November 4, 1936

To COMMANDING OFFICER,

Boston Quartermaster Depot, Army Base, Boston, Mass.

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered: ECW-155-37-57. Pages 2 to 20 inclusive.

The undersigned, Endicott Johnson Corporation a corporation organized and existing under the laws of the State of New York of the city of Endicott N. Y. (place of principal office and principal place of business) hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within ten (10) days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of

the contract, within 10 days after the prescribed forms are presented for signature.

Prices, Net.

XV. NAMES AND LOCATIONS OF FACTORIES

Bidders must state in space provided below names and locations of the factories where manufacture of the item bid upon will be performed. The performing of any of the work contracted for in any place other than that named in the bid is prohibited unless the same is specifically approved in advance by the Contracting Officer. If more than one place of manufacture is named, the quantity to be manufactured in each place must be given:

NAMES AND LOCATIONS OF FACTORIES:	QUANTITIES
"George F. Tabernacle" Factory (item 1)-----	133,524 pairs
East side of Washington Street (item 2)-----	182,256 pairs
(South of corner Susquehanna Street), Bing-	
hamton, N. Y. (total items 1 and 2)-----	315,780 pairs

335

Plaintiff's Exhibit 2-B

PC-1 (Department of Labor form)

239
CONTRACTOR
S C
COMMODITY
SOURCE
AGENCY
SS

NOTICE OF AWARD OF CONTRACT

(Pursuant to Article 1201 of Series A of the Regulations issued under Public No. 846, 74th Congress. (This form need not be submitted when it is definitely known that the total amount will not exceed \$10,000.))

To DEPARTMENT OF LABOR, Washington, D. C.

Department, War, Quartermaster Corps. CCC.

Bureau or Division, Army Base, Boston, Mass.

Amount, \$759,801.72. Date of award, 11/9/36. Contract No.

W 155 qm-ECW66.

Contractor, Endicott Johnson Corp.

Address, Endicott, N. Y.

For 133,524 pairs Shoes, Service; Special Type "B" with Full Middle sole and Rubber Heel; 182,256 pairs Shoes, Service, Special Type "B," with Corded Rubber Sole and Uncorded Rubber Heel.

To be manufactured at or supplied from Geo. F. Tabernacle,
(Name and location

Binghamton, N. Y.

of plants)

Delivery date March 30, 1937.

HARRY H. WOODRING,

(Awarding officer)

Secretary of War, War Department, Washington, D. C.

(Title)

(Address)

(To be submitted in duplicate.)

Plaintiff's Exhibit 3-A

UNITED STATES DEPARTMENT OF LABOR

FRANCES PERKINS, Secretary

DIVISION OF PUBLIC CONTRACTS

L. Metcalfe Walling, Administrator

RULINGS AND INTERPRETATIONS UNDER THE WALSH-HEALEY
PUBLIC CONTRACTS ACT

Public, No. 846, Seventy-fourth Congress, Approved June 30, 1936

Rulings and Interpretations No. 1

[SEAL]

United States

Government Printing Office

Washington: 1937

RULINGS AND INTERPRETATIONS UNDER THE WALSH-HEALEY
PUBLIC CONTRACTS ACT

SECTION 1.—CONTRACTS

1. COVERAGE

The Public Contracts Act applies to "any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or

by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, or equipment in any amount exceeding \$10,000."—The Act, section 1.

2. ASSEMBLING

A contract for an article which is produced by assembling miscellaneous parts purchased by the contractor from others is a contract to manufacture an article in the sense in which that term is used in the Public Contracts Act.

337

SECTION 2.—CONTRACTORS

1. PRIMARY CONTRACTORS

a. The Act.—The Public Contracts Act requires that every contractor be "a manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract."—The Act, section 1 (a).

b. Manufacturer.—A "manufacturer" is a person who owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.—Regulations, article 101 (a).

(1) Assembler.—A contractor who produces an article by assembling miscellaneous parts, all or some of which may have been purchased from others, is a manufacturer within the contemplation of the Act.

c. Regular dealer.—(1) Definition.

"A regular dealer is a person who owns, operates, or maintains a store, warehouse, or other establishments in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business."—Regulations, article 101 (b).

(2) Brokers.—A broker who does not possess the qualifications of a "regular dealer" as defined in the Regulations of the Secretary is not entitled to the award of a Government contract under the Act, unless he bids in the name of his principal.

2. SECONDARY CONTRACTOR

a. Subcontractor under manufacturer.—If a contract is awarded to a manufacturer subject to the Act and in the normal course of

business, the manufacturer purchases supplies or materials which are used in manufacturing the commodity required by the Government, the work performed by the vendor of such supplies and materials and his employees is not subject to the Act.

The one exception to this rule is that under section 1 (e) of the Public Contracts Act the manufacturer agrees that any part of the work performed under the contract will not be under working conditions which are insanitary or hazardous or dangerous to the health and safety of the employees involved.

SECTION 3.—EMPLOYEES

1. GENERAL RULINGS AND INTERPRETATIONS

a. The Regulations.—“The stipulations shall be deemed applicable only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract and shall not be deemed applicable to office or custodial employees.”—Regulations, article 102.

b. General interpretation.—The employees not covered by the provisions of the Act fall within three groups:

338 (a) Those who are not engaged in the performance of the Government contract.

(b) Those engaged exclusively in office work, and

(c) Those engaged exclusively in custodial work.

The following constructions placed upon classes of employees must not be regarded as applicable to all industries or to all employees bearing a certain title. The status of each employee must be judged separately from the particular work performed by him. The determination as to whether or not a specific employee falls within an exempt classification is a question for decision by the Department of Labor in the light of the specific circumstances surrounding the employment of the given individual.

c. Workers not engaged on Government work.—The following employees have been construed to be outside the Act:

(a) Employees on commercial work when such employees are actually segregated and when separate records are kept for employees on Government work.

(b) Research workers engaged in general experiments not specifically involved in the productive process.

(c) Such employees as foremen, performing no manual operation and having no direct contact with goods or equipment involved in the performance of the Government contract.

(d) Outside crews.

(e) Service and repair men.

(f) Instructors who do not handle the machines or materials involved in the production of the Government goods.

d. Workers engaged on Government work.—The following employees have been construed to be employees engaged in or connected with the Government contract:

(a) Apprentices and learners employed on Government work.

(b) If no separate records for employees engaged on Government work are maintained, all employees in the plant are presumed, until affirmative proof is presented to the contrary, to be engaged on Government work.

(c) Technical workers, such as laboratory technicians and draftsmen, closely associated with the productive processes involved in the manufacture of goods or commodities required by the Government.

339

SECTION 4.—WAGES

1. GENERAL PROVISIONS

"All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: Provided, however, That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject of a determination by the Secretary of Labor."—Regulations, article 1 (b).

"Until a determination of the prevailing minimum wage for a particular industry or group of industries has been made by the Secretary of Labor prior to the invitation for bids, the stipulation with respect to wages in section 1 (b) of the Act will be inoperative, as provided in article 1 (b) of these Regulations.

"Determinations of prevailing minimum wages or changes therein will be published in the Federal Register and sent to contracting officers through circular letters of the Procurement Division of the Treasury. Such determinations will be effective upon the dates fixed therein."—Regulations, article 1101.

2. GOVERNMENT AND PRIVATE CONTRACTS

An individual engaged in the performance of a Government contract subject to the Public Contracts Act is entitled to the required minimum wage for the week in which any Government work was performed by him even though he may have been assigned to commercial work during part of that period.

4. OVERTIME

a. General regulations.—“Employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, provided such persons shall be paid for any hours in excess of such limits the overtime rate of pay which has been set therefor by the Secretary of Labor.

“Until otherwise set by the Secretary of Labor the rate of pay for such overtime shall be one and one-half times the basic hourly rate or piece rate received by the employee.

“If in any 1 week or part thereof an employee is engaged in work covered by the contractor's stipulations, his overtime shall be computed after 8 hours in any 1 day or after 40 hours in any 1 week during which no single daily total of employment may be in excess of 8 hours without payment of the overtime rate.”—Regulations, article 103.

b. On Government plus commercial work.—(1) When an employee is engaged on Government work subject to the provisions of the Public Contracts Act, he is entitled to time and a half for all overtime in excess of 8 hours in any 1 day or 40 hours in any 1 week, even though part of those periods was devoted to commercial work.

(2) If an employee works Monday morning on a Government contract subject to the Act, he is entitled to time and a half for all time in excess of 8 hours on that Monday or in excess of 8 hours on any of the 6 succeeding days, or in excess of 40 hours in the 7-day period commencing Monday morning, regardless of the kind of work performed during the remainder of that week.

(3) If a pay-roll period runs from Monday through Sunday and an employee starts on Government work subject to the Act Wednesday morning, the employer may elect to follow his usual pay-roll week or to adopt a new week commencing Wednesday morning and ending Tuesday evening. In either event all time

over 40 hours in the accepted work week must be considered overtime.

c. On weekly or monthly salaries.—The fact that certain employees are paid on a weekly or monthly basis does not affect their right to overtime payment at one and one-half times their basic hourly rate.

340

Plaintiff's Exhibit 3-B

UNITED STATES DEPARTMENT OF LABOR

FRANCES PERKINS, Secretary

DIVISION OF PUBLIC CONTRACTS

L. Metcalfe Walling, Administrator

WALSH-HEALEY PUBLIC CONTRACTS ACT

(Public No. 846, Seventy-fourth Congress, Approved June 30, 1936; 49 Stat. 2036; U. S. C., title 41, secs. 35-45)

Rulings and Interpretations, No. 2—Superseding No. 1, issued July 6, 1937

[SEAL]

September 29, 1939

United States
Government Printing Office
Washington : 1939

RULINGS AND INTERPRETATIONS UNDER THE WALSH-HEALEY PUBLIC
CONTRACTS ACT

SECTION I.—COVERAGE

2. INTEGRATED ESTABLISHMENT

When a contractor to whom a contract subject to the Act is awarded operates an integrated establishment which manufactures or produces materials or supplies that are incorporated

into or otherwise used in the manufacture or supply of the materials, supplies, articles, or equipment called for by the contract, the Act is applicable to those departments which are engaged in the manufacture or production of the materials or supplies to be so incorporated into or used in the manufacture or processing of the ultimate product to be delivered to the Government as well as to the employees engaged in the manufacture or processing of that ultimate product. For example: The processing of the leather and rubber for the shoes supplied under Government contracts subject to the Act is within the purview of the Act and Regulations, and compliance therewith is essential.

The production of sand and gravel for use in the manufacture of ready-mixed concrete required under a Government contract is subject to the Act.

The manufacture of pulp or paper required to be used in the performance of a Government contract subject to the Act for a finished commodity or commodities must likewise be in compliance with the Act.

4. STOCK ON HAND

A person who accepts a Government contract subject to the Public Contracts Act is not prevented by the Act from filling that contract by supplying material which was manufactured before the contract was awarded. The Act does not apply retroactively to any employee who was employed in manufacturing such material, but the Act does apply to any employee who works on the material, either in further manufacturing operations or in packing or shipping the finished product, after the date of the award of the contract.

Where a contractor who has taken a contract subject to the provisions of the Public Contracts Act for the supplying of sand, gravel, ready-mixed concrete, crushed stone, slag, and the like, has in stock at the time the performance of the contract is to begin and at all times during the period that the contract is in effect, stock adequate to supply at once the total remaining demands of the Government under the contract and the contract is filled by delivery from such stock, it may be considered that these materials are in stock even though the stock pile is added to at regular intervals to meet the demands of the commercial end of the contractor's business.

SECTION II.—CONTRACTORS

2. SECONDARY CONTRACTOR

a. Subcontractor under manufacturer.—If a manufacturer buys materials, supplies, articles, or equipment to be used in manufacturing the commodity required by his contract with the Government, and if it is a regular practice in the industry of which he is a member to purchase such materials, supplies, articles, or equipment and not to manufacture them, the work performed by the vendor of such purchases is not subject to the Act.

SECTION III.—EMPLOYEES

1. IN GENERAL

All employees (except office, supervisory, custodial, and maintenance employees) who, after the date of the award, are engaged in any operation preparatory or necessary to or in the performance of the Government contract are subject to the Act.

342 *Plaintiff's Exhibit 4-A for Identification*

(Certified copies of correspondence on file in the Division of Public Contracts, Department of Labor.)

343 [Letter of May 4, 1939]

80/219—fgg/elp.

MAY 4, 1939.

Mr. W. H. RUNGE,

Alabama Marble Company, Gantt's Quarry, Alabama.

DEAR MR. RUNGE: Since receipt of your letter of March 31st an analysis has been made of the facts relating to your performance of two Government contracts, and representatives of this office have discussed the case with Honorable Sam Hobbs.

It is apparent from the facts that certain of your employees are entitled to additional amounts for overtime pay and it is also apparent that the employees who worked in the quarry are not within the purview of the Act for the reason that the headstones were made from a stock of material on hand. Computations of the additional amounts due to the other employees are now being made and when they are completed I will communicate with you further.

For your information I am enclosing a copy of a letter which was addressed to Mr. Hobbs on April 26, 1939.

Very truly yours,

WM. R. McCOMB,
Acting Administrator.

Encl. (1).

344

[Letter of April 26, 1939]

wbg-ep.

APRIL 26, 1939.

The Honorable SAM HOBBS, M. C.,
United States House of Representatives.

MY DEAR CONGRESSMAN HOBBS: This will serve to confirm the information given to you by Mr. Grogan of our legal staff to the effect that under the circumstances recited by you the quarry operatives of the Alabama Marble Company are not subject to the provisions of the Public Contracts Act. The facts as I understand them to be are as follows:

The stone is quarried by the quarrymen of the contractor but not for the purpose of producing headstones. The headstones called for by the Government are small and are made from the stone that is chipped off from larger granite blocks for which there is another market, and for the production of which the quarry is primarily operated. The chipped-off stone is removed from the quarry and stored in a waste pile. The headstones called for by the Government are produced from this quarry waste.

I must advise you, of course, that the operations of the men who saw the granite, polish, and perform other operations necessary to the perfection of the stone for Government use are subject to the provisions of the Public Contracts Act.

Very truly yours,

L. METCALFE WALLING,
Administrator.

345

[Letter of March 23, 1939]

.80/219—fgg elp.

MARCH 23, 1939.

Mr. W. H. RUNGE,
Alabama Marble Company, Gantt's Quarry, Alabama.

DEAR MR. RUNGE: Further reference is made to your letter of March 2 and to Mr. Walling's reply of March 14.

Before reaching a decision on the question whether the employees of your quarry and saw-mill are subject to the Public

Contracts Act I will appreciate being advised whether, at the time the contract was awarded and at all times during its life, you had on hand a stock which was ample to supply the materials required under the contract, and whether such stock was used exclusively in filling the contract. I would also like to be advised whether your stock on hand consisted of material in the form in which it was taken from the quarry or whether it consisted of material which had already passed through the saw-mill.

Very truly yours,

WM. R. McCOMB,
Acting Administrator.

346

[Letter of March 2, 1939]

ALABAMA MARBLE COMPANY

ALABAMA MARBLE

Gantt's Quarry, Ala.

MARCH 2, 1939.

Mr. L. METCALF WALLING, *Administrator,*

Division of Public Contracts,

United States Department of Labor, Washington, D. C.

DEAR SIR: During the visit of your representative, Mr. E. H. Miller, to inspect our records in connection with our contract with the Quartermaster's Department for markers, we were very much surprised to find that our quarry and saw-mill operations were to be included along with our manufacturing operation as part of our compliance with the Walsh-Healey Public Contracts Act. Since we are not furnishing the Government with raw products we are at a loss to figure why our quarry and saw-mill operations should be included as part of our manufacturing operation. Surely the act does not sanction or advocate discrimination as between bidders. We feel, after studying the Walsh-Healey Contracts Act stipulations as attached to our contract and the rulings and interpretations approved June 30, 1936, that they very definitely outline and determine the competitive compliance under the act, and further, definitely differentiate between raw and crude material competition as compared to competition between manufactured and finished products. Might we suggest that when a manufacturer purchases the raw materials to be fabricated into finished articles under this act, that the fabrication unit of this manufacturer seems to be subject to compliance under the act. The source of supply, however, for the semiprocessed products he purchases from others does not seem to be under the supervision of this act.

We have always considered the crude material from which markers are produced in the nature of a byproduct. Our quarry production is charted for standard size blocks. In producing standard size blocks 65% of our production yields blocks not suitable or salable to the Trade in that form. A part of the 65% is only merchantable when and if orders are contracted on which some of this material can be used. We do not, even when we have a contract to furnish markers, try to quarry for blocks to finish our marker contract. We must, however, admit that when
347 we are furnishing markers that our production always yields blocks from which markers can be sawn. These blocks are not produced for this purpose, and if we did not at the time have a contract for markers, would be stored with the hope that some day we might find orders on which to use them.

To clarify this part of our operations further, it should be noted that blocks used in the production of markers are not numbered or recorded, for the reason that no determination regarding their disposal can be made until orders are secured that would fit this material. For this reason we have never made it a practice to identify this part of our production with any particular period when we may have worked overtime. Under no circumstances can we conceive of having to work our quarry or sawmill overtime for the production of material for markers, and it is only a matter of normal production if some of the material produced during overtime operations is available for markers. The fact that during the contract time for the finishing of markers we may have worked overtime in our quarry does not mean that we have worked overtime to produce markers. Experience has determined for us the size material we should produce from our quarry to accommodate normal demands, and the natural conditions encountered in our operations have determined for us the material available for markers and similar products.

Your attention is invited to the fact that if in our case the production of our raw materials are a part of our compliance with the Walsh-Healey Public Contracts Act, then all other bidders for similar work should be subject to the same rules and regulations. Otherwise, industries similar to our bidding on this type of work are discriminated against in cost of operations and competition.

Very truly yours,

ALABAMA MARBLE COMPANY,
(Signed) W. H. RUNGE,
Vice Pres. & Gen'l Mgr.

WHR:MG.

(Original & 1 copy handed Mr. Miller.)

348

Plaintiff's Exhibit 4-B for Identification

(Certified copies of correspondence on file in the Division of Public Contracts, Department of Labor.)

349

[Letter of January 9, 1937]

JANUARY 9, 1937.

MR. CHARLES D. MACGILLIVRAY, *Secretary,*
The Baldwin Locomotive Works,
Philadelphia, Pennsylvania.

DEAR MR. MACGILLIVRAY: I have your letter of January 6, 1937, in which you put in writing several of the questions which we recently discussed with respect to the effect of the Walsh-Healey public contracts act upon the Baldwin Locomotive Works and its subsidiaries. I shall take up your questions separately in the order in which you have arranged them.

1. Although this Department has not issued any comprehensive description of those employees who are within the class of "custodial employees" exempted by article 102 of the regulations of the Secretary of Labor, it is fairly clear that this exemption applies to certain well-defined occupations. These would include watchmen, timekeepers, janitors, guards, messengers and elevator operators, maintenance crews, and nurses.

2. In general, it may be said that the act covers those employees whose tasks are a part of and normally associated with the production of the articles for which the government contract calls; conversely, employees engaged in occupations which are unrelated to production, and which have no special connection with the goods contracted for, are not within the act. Applying this test to the classifications about which you have inquired, I would answer the various parts of your second question as follows:

(a) Foremen and other supervisory employees not manually engaged in production are not covered by the act.

(b) and (c) In view of your explanation, I have assimilated product inspectors and test engineers as a single class. I understand that the latter perform manual examinations of the products, and consequently both groups stand in the direct line of production.

350 (d) In so far as the duties of laboratory employees are similar to those of product inspectors and test engineers, the answer would of course be the same. In so far, on the other hand, as they are engaged in experimental work prior to the commencement of production of particular materials, I think that they would not be covered.

(e) The Public Contracts Board has ruled that maintenance and repair crews are not subject to the act.

(f) Storeroom personnel not engaged in warehousing government goods would be within the exemption. ²

(g) Internal transport personnel engaged in moving materials used in connection with production of a government contract would, I think, be subject to the act. Elevator boys, and employees having no duties which might bring them into the direct line of production would be outside the provisions of the law.

(h) Watchmen are of course exempt as custodial employees.

(i) Power plant personnel, including powdered coal plant substation operators, are probably not within the act. It will depend upon the particular facts with reference to the details of their duties, however, whether this may be taken as generally true or not.

3. Your third inquiry relates to the casting in the open hearth department of ingots for stock, out of which they are taken to be used in production. Under these circumstances, it is frequently impossible to determine what particular ingots will go into the manufacture of the equipment for the government. Since the Walsh-Healy Act has no retroactive effect and has therefore been construed as not applicable to parts already manufactured at the time of the award of the contract, I think that the same rule should obtain here, although this view has been taken before usually where the producer of the stock articles is an independent manufacturer. Accordingly, except in those instances where the production of ingots is part of an uninterrupted process of manufacture in the case of government goods, the employees in the open hearth department are not subject to the Walsh-Healy Act.

4. The sweeping language in section 1 (b) of the act prohibits deductions from the minimum legal earnings of employees 351 protected by the act "on any account." Consequently it has been necessary for the Department to take the view that deductions for dues in plant associations, for purchases at companies' stores and for similar local transactions are within this prohibition, if they reduce the wages of the employees below the established minimum. Deductions required by the Social Security Act, however, and by similar state tax law, are not within this class since they are levies upon the income of employees collectable through the agency of the management.

5. You are correct in interpreting the act as affecting only those having a direct contractual relation with the government. In the hypothetical case, the X company would not be required to agree to the stipulations required by the law.

6. Although section 1 (e) of the act qualifies to some extent the general statement made in the preceding paragraph, there is no

requirement that the principal contractors obtain certificates of compliance from their vendors or that they police the plants of subcontractors. Upon them is the obligation only to exercise particular caution with regard to such plants as may be engaged in government work where part of the contract is sublet.

Very truly yours,

GERARD D. REILLY,
*Acting Administrator,
Public Contracts Act.*

JWP:cf.

352

[Letter of January 6, 1937]

THE BALDWIN LOCOMOTIVE WORKS

PHILADELPHIA

Charles D. MacGillivray, Secretary.

JANUARY 6, 1937.

Mr. GERARD D. RILEY,

*Acting Administrator, Public Contracts Act,
Department of Labor, Washington, D. C.*

DEAR MR. RILEY: I wish to thank you for your courtesy to me when I called on you recently with regard to the applicability of the Walsh-Healey Public Contracts Act to the activities of some of our subsidiary companies.

You will remember I stated that my associates might want to have in writing for our guidance your replies to the various questions I asked. I find that this is the case and, accordingly, would appreciate having your written replies to the following questions:

1. Paragraph (c) of the Walsh-Healey Act reads as follows:

"(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week."

In regulations prescribed by the Secretary of Labor on September 14, 1936, this provision of the Act has been interpreted as follows:

"Art. 102 (Employees Affected). The stipulations shall be deemed applicable only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment

required under the contract and shall not be deemed applicable to office or custodial employees."

What classes of employees are defined as "custodial employees"?

2. In a plant where most of the production is for commercial customers (that is, customers other than the United States Government or Government entities), does Paragraph (c) of the Act as interpreted by Art. 102 above apply to:

(a) Foremen and other supervisors in the workshop.

(b) Technical men in the workshop such as test engineers, observers, etc.

(c) Product inspectors.

(d) Employees of chemical and metallurgical laboratories.

353 (e) Maintenance and repair personnel (routine and emergency) not engaged on production.

(f) Storeroom personnel not engaged in warehousing of Government materials.

(g) Internal transport personnel.

(h) Watchmen.

(i) Power plant personnel (including powdered coal plant, oxygen plant, and substation operators).

As I recall, you stated verbally that the provisions of the Act do not apply to product inspectors, but do apply to test engineers and observers in the workshop. As I pointed out to you at that time, test engineers and observers in our workshop are really inspectors of operations, whose duty it is to see that prescribed procedures are carried out. The duties of the men classified as product inspectors (whom you stated are not subject to the Act) have to do with the inspection of the finish and fits of the product. From this point of view, and because they do not engage in production, I believe both groups should be exempt from the provisions of the Act.

3. Where an open-hearth department produces ingots for stock only, which ingots are not allocated to a specific sales order until taken from stock, is the personnel employed in such open-hearth department subject to the provisions of the Walsh-Healey Act?

It will be appreciated that under the circumstances above mentioned it is not possible as a practical matter to determine whether or not such open-hearth personnel is engaged at any given time on the production of ingots that may be used subsequently in connection with Government work. For instance, ingots produced from a given heat of steel in the open hearth eventually may be used partially on Government work and partially not. Further, until an open-hearth heat of steel is made, analyzed, and, in many

cases, forged, it is not possible to determine whether it is suitable metallurgically for use on a given Government job.

For these reasons, and because the operation of an open hearth is a continuous process employing highly skilled workers, the old Eight-Hour Law applicable to Government work exempted open-hearth personnel.

Under these circumstances does not the same exemption apply with regard to the provisions of the Walsh-Healey Act?

4. Paragraph (b) of the Walsh-Healey Act reads as follows:

"(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract."

It has always been our practice to deduct from all wages paid, such items as dues in the Beneficial Association, the price of articles sold to employees, deposits on identification badges; and, after December 31, 1936, deductions must be made under the provisions of the Social Security Act.

Are any of these deductions prohibited by the provisions of Section (b) above? In other words, is there anything in the Walsh-Healey Act or in the regulations issued by the Secretary of Labor with regard to it which prevents the Company from collecting from workmen, by deductions from their pay, sums due the company by virtue of voluntary commitments on the part of the workmen, such as dues in a beneficial association, compensation for articles sold workmen by the company, etc.

5. We believe from a reading of the Act that paragraph (e) is the only portion thereof applicable to subcontractors and suppliers of materials, and that the remaining portions of the Act are applicable only to the prime contractor.

For example, if X company takes an order from Y company, a prime contractor to the Government, for shafting for a Navy cruiser, in an amount in excess of \$10,000, we do not believe that the provisions of the Walsh-Healey Act with regard to hours of work and wages to be paid apply to X company in the performance of such order.

We would appreciate your confirmation that this understanding is correct.

6. Paragraph (e) of the Walsh-Healey Act reads as follows:

"(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings, or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory-inspection laws of the State in which the work, or part thereof, is to be performed shall be prima-facie evidence of compliance with this subsection."

355 Is the prime contractor required under this provision to obtain certificates from vendors to the effect that their portion of the work will be performed in accordance with this provision of the Act? If so, has the contractor any responsibility to see that such subcontractors live up to the terms of such certificates?

Yours faithfully,

(Signed) C. MACGILLIVRAY, *Secretary.*

men.

356

Plaintiff's Exhibit 4-C for Identification

(Certified copies of correspondence and memoranda on file in the Division of Public Contracts, Department of Labor.)

357

[Letter of January 19, 1940]

83/386 jhp/lb.

JANUARY 19, 1940.

MR. THOMAS H. HANNAFORD, *President,*

Crystal Concrete Corporation,

200 Plain Street, Braintree, Massachusetts.

DEAR MR. HANNAFORD: The report of an inspector of this Department indicates that there have been breaches of contract and violations of the Public Contracts Act (49 Stat. 2036) in your establishment in connection with the following two Government contracts:

Contract number ER-Tps-14-14013 awarded June 10, 1938, to the Crystal Concrete Corporation, commodity, ready-mixed concrete, amount \$43,935.75; and contract number ER-Tps-14399, awarded to the Old Colony Crushed Stone Company.

The breaches and violations consisted of failure to pay the required overtime rate to employees who worked in excess of 8 hours per day or in excess of 40 hours each week, during weeks in which they were engaged in the performance of these contracts; failure

to post a copy of the stipulations and to keep and maintain records of employees' names, addresses, sex and occupations, all as required by the regulations of the Secretary thereunder. The periods during which the breaches and violations occurred with respect to these contracts are as follows: November 5 to November 17, 1938; November 25, 1938 to February 16, 1939; February 24 to March 2, 1939; March 17 to March 23, 1939. All the calculations are based upon the records of daily and weekly hours worked, hourly rates of pay and the total amount paid each pay period.

Whenever an employee is engaged in or connected with the manufacture, fabrication, assembling, handling, supervision or shipment of materials, supplies, articles or equipment required under the Government contract subject to the Act, he is entitled to one and one-half times his regular rate of wages for all hours worked in excess of 8 in any one day or 40 in any one week, whichever is the greater. If an employee works one day or any part thereof on the Government contract, this overtime rate must be paid for all overtime hours worked during that particular pay roll or work week, regardless of the fact that the overtime may have been performed on commercial work as distinguished from work on the Government contract.

Enclosed is a list of the employees concerned and the amounts due to the United States on account of work performed by each of them. In accordance with the terms of the Act, it is requested that you forward your certified check made payable to the Secretary of Labor in the amount of \$174.92. This amount will be disbursed to the employees concerned. From this amount you may make any deductions required to be made under the Social Security program, if you will furnish a statement indicating the amount you have deducted as to each employee.

Demand is made upon you for payment for violations on contract ER-Tps-14399, in accordance with the regulations of the Secretary, which provide that whenever a dealer to whom a contract within the Act and Regulations has been awarded causes a manufacturer to deliver directly to the Government, the materials, supplies, articles or equipment required under the contract, such dealer will be deemed the agent of the manufacturer in executing the contract. As the principal of such agent, the manufacturer will be deemed to have agreed to the stipulations contained in the contract.

Very truly yours,

L. METCALFE WALLING, *Administrator.*

Enclosure (1).

[Memorandum of January 10, 1940]

JANUARY 10, 1940.

To Mr. Grogan.

From Mr. Fogg.

Re Contractors, Old Colony Crushed Stone Co., Quincy, Massachusetts, Crystal Concrete Corp., Braintree, Massachusetts; Manufacturer, Crystal Concrete Corp., Braintree, Massachusetts, Reg. No. 8510 and Con. No. ER-Tps-14399; investigator, Corbett.

Under date of April 13, 1939, the case in reference to Reg. No. 8510 and an unidentified contract—ER-Tps-14399, performed by the subject manufacturer, was transmitted to you for determination. On May 4, 1939, you addressed a memorandum to us giving us the desired ruling, however, the file was apparently misplaced.

The computations have now been made and disclosed overtime violations totaling \$174.92, involving 19 employees. There were further violations in that a copy of the contract stipulations was not posted; (It was stated that a poster had not been received.) records of employees' names, addresses, sex, and occupations were not complete, and time records were not adequate.

R J. F.

Att: File.

[Memorandum of May 4, 1939]

83/386—rsh/elt
MAY 4, 1939.

MEMORANDUM

To Mr. Fogg.

From Mr. Grogan.

Re Crystal Concrete Corporation

From the facts given in your memorandum of April 13, I wish to advise that the Act and Regulations apply to those employees of the Crystal Concrete Corporation who mined and delivered sand to the mixing plant for use in the mixing of the ready mixed concrete required under Contract No. ER-Tps-14399, as well as to those employees of this company who hauled the crushed stone to the mixing plant for the mixing of the ready mixed concrete.

W. B. G.

361

[Memorandum of April 13, 1939]

mrs/lp.

APRIL 13, 1939.

To Mr. Grogan.
From Mr. Fogg.

Re Contractor & Manufacturer on #8510, Crystal Concrete Corporation, Braintree, Mass.; Contractor on Cont. ER-Tps-14399, Old Colony Crushed Stone, Quincy, Mass.; Manufacturer, Crystal Concrete Corporation, Braintree, Mass., Investigator, Corbett

On the contract covered by Reg. No. 8510, the contractor delivered to the Government ready-mixed concrete. The contractor operates their own sand and gravel pit and hauled these materials in their own trucks to their mixing plant in another location where it was mixed with cement and water, and delivered to the Government in their own transit-mix trucks.

The contractor raises the question as to whether or not the regulations of the Act apply to his pit as well as to the mixing plant.

The contract ER-Tps-14399 was awarded to Old Colony Crushed Stone, and according to information given the inspector by the Crystal Concrete Corporation, crushed stone was purchased from the Old Colony Crushed Stone Company and brought to the plant of the Crystal Concrete Corporation by their own trucks and independent truckers. The sand which was combined with the crushed stone was mined by the Crystal Concrete Corporation and hauled in their own trucks to their mixing plant where it was mixed with the crushed stone and cement. The same question arises on this contract. There is an overtime violation on the employees who mined and hauled the sand, gravel and crushed stone.

The file is submitted for determination as to whether or not computations should be made on these employees.

R. J. F.

Plaintiff's Exhibit 4-D for Identification

(Certified copies of correspondence on file in the Division of Public Contracts, Department of Labor.)

[Letter of December 30, 1936]

DECEMBER 30, 1936.

Mr. WILLIAM S. ELLIOTT,

Vice President and General Counsel,

International Harvester Company, Inc.,

606 South Michigan Avenue, Chicago, Illinois.

DEAR MR. ELLIOTT: Pursuant to our conference yesterday and your subsequent letter, the Department has considered a number of questions raised by the International Harvester Company with respect to the application of the Walsh-Healey Act (Act of June 30, 1936, Public No. 846, 74th Congress).

While the Department appreciates that under the codes of fair competition the factories of your company were permitted a tolerance in the forty hour week provision so as to permit averaging of time, it does not seem possible under Public Act No. 846 to grant such a device. The act is quite explicit in requiring that in manufacturing operations performed on a government contract falling within the act, no employee be permitted to work more than eight hours in any one day or forty hours in any one week without receiving time and one-half for the hours worked in excess of those limits.

The questions which you have submitted to me relate specifically to the scope of the act in contracts for motor trucks. I understand that your company operates two motor truck plants and also separate factories in which farm implements, magnetos for tractors, and steel and other materials are manufactured.

Your first question is whether the company would be complying with the stipulations required by the act if it adapted its operations in the truck factories to these standards, or whether they also apply to the other mills owned and managed by the company. Inasmuch as Congress limited the scope of the act to manufacture of the articles required under the government contract, your company would be complying with the act on truck contracts if the truck factories were operated in conformity with the law.

Your second question relates to the employment of foremen. It is understood that these foremen are salaried employes and are not manually engaged in productive operation under the contract.

363 In a recent opinion rendered to the Public Contracts Board in connection with textile manufacturing, the Solicitor of Labor ruled that foremen in this category do not come with-

in the act. It follows that this ruling is equally applicable in this instance.

Your third question notes that custodial and maintenance employees are not covered by the act and regulations and you ask for a more precise list of employees falling into this category. Employees in this class include watchmen, timekeepers, janitors, firemen, repair crews and outside crews.

Your fourth question asks whether employees in branch warehouses and service stations engaged in maintaining stocks for repairs for trucks and in performing repair services for trucks are covered by the act. It has been a consistent ruling of the Department that where the bidder is a manufacturer the act applies to the manufacturing operations and not to the distribution of the product. It is understood that none of the employees of these branch units are engaged in manufacturing. Consequently these employees do not come within the act.

The answers given to the foregoing questions, although directed primarily with regard to contracts for motor trucks, are sufficiently broad to apply also to contracts for tractors, or for any other articles, materials, supplies or equipment contracted for in excess of \$10,000.

I trust that this letter will clarify those features of the act which are of principal concern to your company, and that you will feel free to write again if other questions occur to you.

Sincerely yours,

GERARD D. REILLY,
Acting Administrator
Public Contracts Act

Approved:

CHARLES O. GREGORY,
Acting Secretary of Labor.

364

[Letter of December 29, 1936]

INTERNATIONAL HARVESTER COMPANY
INCORPORATED

606 SOUTH MICHIGAN AVENUE

Chicago, U. S. A.

DECEMBER 29, 1936.

Honorable GERARD D. REILLY,
Assistant Solicitor, Department of Labor,
Washington, D. C.

DEAR SIR: At a conference this afternoon in your office, representatives of the Harvester Company submitted a number of

questions relating to compliance with the Walsh-Healey Act and at your request these questions are now submitted in writing.

At the outset we wish to advise you that at the present time and ever since the NRA our Company has been operating its factories on the basis of a forty hour week subject, however, to an averaging provision which was recognized as appropriate to the Company's business and approved as a part of the NRA Code. The purpose of this provision was to give employees sufficient work in excess of forty hours to compensate for weeks during which less than forty hours work could be provided; all with the view to stabilizing wages as nearly as possible on the basis of forty hours per week. The Company's employees generally have valued the averaging feature and we regret that the Walsh-Healey Act contains no provision empowering the Secretary of Labor to permit averaging of hours even though necessary to give employees fair average employment and compensation. Our Company is doing its best to stabilize employment throughout the year but with the seasonable nature of the agricultural implement business and unexpected increases or decreases in demand due to conditions beyond its control, it is not possible to avoid fluctuations.

As our discussion related primarily to qualifying for bidding on motor trucks, we here describe briefly the Company's motor truck manufacture. The Company has two motor truck plants—one at Fort Wayne, Indiana and the other at Springfield, Ohio. Finished trucks are made at both plants and each plant makes certain parts for the other plant. The operations of the two plants consist in the making of engines, axles, crank shafts, transmissions and bodies and the making or finishing of various other parts out of commercial steel or rough castings received from outside sources. All of these parts manufactured 365 locally together with others from outside sources are accumulated in stock piles and finally assembled into finished trucks. Some of the materials and parts come from other plants of the Harvester Company which produce materials, parts, or accessories used in many of the Company's factories manufacturing farm implements, tractors and motor trucks. For example, the West Pullman Works at West Pullman, Illinois, makes roller and ball bearings and magnetos for tractors and motor trucks and the Wisconsin Steel plant at South Chicago makes steel in commercial shapes and sizes for supplying ten Company factories and also for sale on the open market.

Question One.—Will the Company qualify for Government business under the Walsh-Healey Act if all of its operations at the Fort Wayne and Springfield truck factories are conducted in strict accordance with the Act and Regulations of the Secretary

of Labor! It is our belief that this is sufficient to qualify the Company and that it is not necessary to go into the question of how the operations are carried on at the Wisconsin Steel Works or West Pullman Works or other plants from which semi-finished materials or parts may be shipped to Fort Wayne and Springfield as these are separate operations preliminary to the manufacture of trucks and such parts or materials originating at other plants are in regular course of business accumulated in stock piles at the truck factories in advance of the manufacture of trucks and without knowledge as to whether they will afterwards be used in trucks manufactured and delivered to the Government or to other customers. We believe the spirit of the Act is complied with if the truck factories are operated in compliance with the law and that a ruling to this effect will put the Company on a parity in competing with its competitors.

Question Two.—The operations at the Fort Wayne and Springfield truck works involve the employment of foremen. These foremen are salaried employees representing the management and supervising the construction work but not taking part therein. We ask for a ruling as to whether these foremen come under the requirements of the Walsh-Healey Act or are excluded therefrom under the Act or Regulations of the Secretary of Labor.

Question Three.—We understand that since the publication of Regulations No. 504, you have had occasion to consider and to rule in more detail on the kinds of employees who are exempted from the provisions of the Walsh-Healey Act, such as custodial or maintenance employees. Will you kindly give us as full a list as practical of the kinds of work or employees exempted.

Question Four.—The Harvester Company maintains over three hundred branch warehouses and service stations throughout the United States at which stocks of repairs for trucks are stored. Repair stocks are also maintained with several thousand dealers. The Government would like to contract with the Company for the purchase of repairs at an agreed discount to be supplied as ordered to any Government Agency or projects using trucks at any place throughout the United States. This prompt truck service is essential to the Government but it would be seriously interfered with if all branch house operations were to be put on a forty-hour week. Furthermore, experience has proved that this is impossible if the Company's many farmer customers are to be properly served. It is our contention that delivery of repairs out of previously accumulated stocks at such warehouses is not in opposition to the Walsh-Healey Act. The annual contract with the Government is nothing more than an option. No contract exists until orders are placed and these orders are generally small or if large, they are filled direct from the factory in which case

no question regarding the branch house would arise. Will you please rule on this question.

These above questions refer to our truck operations as specific examples. Similar situations will arise with respect to qualifying to bid on tractors but if the above questions are answered with respect to trucks, we will be in a position to apply these answers to the tractor operations.

The Company respectfully asks for a written ruling on these questions as this is necessary before it can determine whether it is practicable to qualify for Government business.

Very respectfully,

(Signed) WILLIAM S. ELLIOTT,
Vice President & General Counsel.

ss.

367

Plaintiff's Exhibit 4-E for Identification

(Certified copies of correspondence on file in the Division of Public Contracts, Department of Labor.)

[Letter of April 12, 1939]

STANDARD FURNITURE COMPANY

OFFICE DESKS

Herkimer, New York

S. M. Brewer, President; E. Rhodes, Vice Prest.; A. W. Smith, Treasurer; G. F. Stevenson, Secretary.

APRIL 12, 1939.

Reference: 81/830-fgg/elp

DEPARTMENT OF LABOR,

Division of Public Contracts, Washington, D. C.

GENTLEMEN: In accordance with your letter of Mar. 23rd and the reply of our Mr. Brewer dated Mar. 30, 1939, we are enclosing a certified check to the order of the Secretary of Labor in the amount of \$2,130.30.

We are also enclosing a list prepared from that forwarded by you and have included therein the deductions for each employee for U. S. Old Age Benefit Tax under the Social Security Act.

Yours very truly,

STANDARD FURNITURE COMPANY,
(S) ALBERT W. SMITH, Treasurer.

AWS/R.

368

[Letter of March 23, 1939]

81/830 fgg/elp.

MARCH 23, 1939.

STANDARD FURNITURE CO.,

Herkimer, New York.

GENTLEMEN: A report of an inspector of this Department indicates that certain of your employees have not been paid the overtime rate for overtime work performed by them in connection with two Government contracts, as required by the Act of June 30, 1936 (49 Stat. 9036), and that certain employees have been underpaid for their straight time in connection with the same contracts.

When an employee is engaged on Government work subject to the Act, he is entitled to one and one-half times his regular rate of wages for all hours worked in excess of eight in any one day or in excess of forty in any one week whichever is the greater. If an employee works one day or any part thereof on the Government contract, this overtime rate must be paid for all overtime hours worked during that particular pay roll or work week, regardless of the fact that the overtime may have been performed on commercial work as distinguished from work on the Government contract.

Enclosed is a list identifying the contracts and indicating the employees concerned and the amounts found to be due to them for work performed during the periods from January 2 to August 6, from August 28 to September 10, and from October 2, to October 15, all in 1938.

In accordance with the terms of the Act, it is requested that you forward this office your certified check, made payable to the Secretary of Labor, in the amount of \$2,151.33. You may deduct from that amount any sums required to be deducted from the wages of employees under the Social Security Program if you will furnish a statement indicating the amount of the deduction as to each employee.

The Inspector's report also indicates that at the time you were engaged in work on the contracts you failed to post the stipulations as required by a Regulation of the Secretary of Labor.

It also appears that at one stage of your manufacturing process it is necessary to soak logs in a vat of boiling water, and that it is necessary for an employee to walk back and forth across that vat on a narrow plank with no rails or other protection; that the slightest slip or inattention would cause him to fall into the boiling water; and that on one occasion a workman was killed in that manner.

369 Both of these facts are considered to be serious breaches of the Act, and they are called to your attention in order that you may take appropriate steps to insure that the stipulations are posted, and that no hazardous conditions are permitted to exist, in the event you participate in the future in any contracts which are subject to the Public Contracts Act.

Very truly yours,

W. M. R. McCOMB,
Acting Administrator.

Encl. (1).

370

Plaintiff's Exhibit 6

FEBRUARY 23, 1939.

Mr. CHARLES JOHNSON,

Endicott-Johnson Corporation, Binghamton, New York.

DEAR MR. JOHNSON: A report from the Inspectors of this Department now engaged in transcribing employment records of your Company, pursuant to the provisions of the Public Contracts Act and regulations promulgated thereunder, indicates the necessity of advising you relative to the applicability of those provisions to the operations of the Company's rubber plant and tanneries.

Each manufacturing or production process performed by a contractor in the fabrication of the finished product specified in a Government contract covered by the Public Contracts Act must be performed in compliance with the requirements of the Act and the regulations promulgated thereunder by the Secretary of Labor, irrespective of the fact that some of those processes may not normally be performed by their competitors but by independent establishments from whom the competitors purchase. The Act makes no distinction in its coverage between those manufacturing or production processes normally undertaken by a contractor and those not normally performed by him. The processing of the leather and rubber for the shoes supplied under the Government contracts which are now the subject of inspection is consequently within the purview of the Act and regulations, and compliance therewith is essential.

There is an exception to the applicability of the Act and regulations to the processing of leather and rubber, to the extent that the leather and rubber already on hand and in stock at the time the contract is awarded may be used in the production of the shoes required under the contract without any obligation on the part of the contractor to show that such leather and rubber was processed in conformity with the labor standards prescribed by the Act and regulations. Needless to say, the use of items from stock on

hand at the time of the contract award must be definitely established by available records.

The foregoing furnish the ruling apparently desired as a prerequisite to the release of pertinent records to the Inspectors.

Very truly yours,

L. METCALFE WALLING, *Administrator.*

371

Plaintiff's Exhibit 7 for Identification

(Certified copy of interoffice memorandum on file in the Division of Public Contracts, Department of Labor.)

[Memorandum of March 17, 1939]

MARCH 17, 1939.

From William B. Grogan

Re Conference with Messrs. Johnson and Swartwood representing Endicott-Johnson Corp.

MEMORANDUM

To Mr. Walling

This will make record of the above conference, held in your office today.

At the conference both Mr. Johnson and Mr. Swartwood indicated that they were perfectly willing to pay any monies that may be found due to their employees in the so-called George F plant of the company for the failure to pay minimum wages or overtime rates. They contended that there was no substantial overtime worked at the George F. factory but they admitted that at the tanneries and rubber-heel plants the employees worked more than 8 hours a day and 40 hours a week.

They contended that the provisions of the Public Contracts Act should not apply to any factory other than the shoe factory even though they admitted that the manufacturing operations performed in the tanneries and rubber plants on goods that were to be used in the manufacture of the Government shoes were performed after the date of award. They based their contention on the fact that they allege that in commonly accepted industrial usage shoe manufacturing does not include the tanning of the leather which is used in the shoes or the manufacture of the rubber heels and soles. It was pointed out to them that the industrial concept was not controlling and that the Act provided that all the employees of the manufacturer were subject to its provisions. They contended that an interpretation of this kind would be unfair to them inasmuch as they would be at a competitive dis-

advantage with other manufacturers who did not have tanneries or rubber plants and who could, under the Act, buy their supplies from manufacturers who did not produce them under the provisions of the Public Contracts Act even though the supplies such as leather and rubber heels were manufactured after the date of award to the shoe company. It developed at the conference that there were only three shoe manufacturers in the United States so integrated that they produced both their leather and their rubber heel and sole material. The three companies are the International Shoe Co., the Brown Shoe Co., and Endicott-Johnson Co. The parties admitted that while in commercial work integration was not usual; nevertheless, they had to admit that in the case of Government shoes the greatest part of the output was produced by integrated concerns and that as a matter of fact there were only about seven concerns, according to their figures, which ever received Government contracts for the manufacture of shoes.

It was pointed out to Messrs. Johnson and Swartwood that this situation was not one that exists solely in the shoe industry and that other industrialists complained of this competition as unfair. The remedy, however, seemed to be in the way of amendments to the Act.

Messrs. Johnson and Swartwood stated that an interpretation that the tanneries and the rubber heel and sole factories were subject to the Act would be particularly hard in their case inasmuch as segregation of employees working in these plants on Government work from those not so employed was impossible. It was pointed out that this situation was not infrequent in the industry.

Inasmuch as it was not known in advance of the conference what the subject matter was to be, the conference was closed with the suggestion that further study be made of this matter by me. Thereafter, after looking into the files and studying the facts of the case, and talking with Investigator Howe who was at the plant of the International Shoe Company and Inspector Roller who made an inspection at the Endicott-Johnson factory, I saw the parties again and advised them that I could not tell them that the operations of the rubber factory and the tanneries were not subject to the Act. In fact, I advised them that it was my opinion that these operations were subject. I advised them further, however, that their request that further investigation be suspended until the full matter of the question of violations in the shoe factory and of their bona fides in keeping books had been gone into was granted. I am advised by the inspector that the wage and hour records at the tanneries and rubber plants may be relied upon.

W. B. G.

373

Plaintiff's Exhibit 8 for identification

Contracts for boots and shoes subject to the provisions of the Walsh-Healey Act, Sept. 28, 1936, to Jan. 1, 1940

Contractor	Number of awards	Value of awards	Percent of total value
G. H. Bais & Company, Wilton, Maine	1	\$32,760.00	.32
Rose Dry Shoe Manufacturing Co., Tacoma, Washington	2	55,279.50	.55
Brown Shoe Co., Inc., St. Louis, Missouri	4	1,085,025.56	9.87
Chippewa Shoe Manufacturing Co., Chippewa Falls, Wisconsin	7	829,377.34	7.50
Endicott Johnson Corporation, Endicott, New York	13	5,512,088.17	50.00
General Shoe Corporation, Nashville, Tennessee	1	94,000.00	.85
R. F. Hazzard Co., Augusta, Maine	3	185,000.00	1.68
Joseph M. Herman Shoe Co., Boston, Massachusetts	17	3,715,072.08	33.65
International Shoe Co., St. Louis, Missouri	10	2,980,084.04	27.04
Total	56	13,000,927.69	100.00

Prepared by Statistical Section Division of Public Contracts, Department of Labor, March 21, 1941.

374

Plaintiff's Exhibit 9

80/180 cpg/cl.

JULY 15, 1939.

MR. CHARLES F. JOHNSON, Jr.,

Endicott Johnson Corporation, Endicott, New York.

DEAR MR. JOHNSON: Subsequent to my letter of February 23, wherein you were advised that the requirements of the Public Contracts Act applied to the processing of leather and rubber in your tannery and rubberoid departments, you were afforded opportunities of presenting orally and submitting a brief in support of the company's reasons why these departments should not be considered subject to the Act.

The question has been since thoroughly considered by the Department of Labor resulting in a confirmation of my advice to you of February 23. Inasmuch as the inspection of the employment records of the tannery and rubberoid departments was discontinued when only partially completed pending consideration of the points raised by the company, it will be necessary for a representative of this office to complete the inspection and transcription of records.

Very truly yours,

L. METCALFE WALLING, *Administrator.*

(Certified copy of letter on file in the Division of Public Contracts, Department of Labor.)

DEPARTMENT OF LABOR

DIVISION OF PUBLIC CONTRACTS

WASHINGTON

12-5-1939.

Re Endicott-Johnson Corporation 80/180-wam/el4

MR. RALPH J. FOGG,

*Chief of Investigation Section, Division of Public Contracts,
Department of Labor, Washington, D. C.*

DEAR MR. FOGG: Your letter written at the request of Mr. Grant in regard to certain information desired from the Philadelphia Quartermaster Depot in connection with the Endicott Johnson Corporation is received.

Knowing that the Philadelphia Quartermaster could give little information I went yesterday to see Colonel McCain as directed. Shoes are handled out of the Boston Quartermaster Depot, not Philadelphia. However, Colonel McCain offered to write to the Quartermaster for me. "I give you full cooperation, I see no reason why he shouldn't," Colonel McCain stated.

Should you desire me to go to the Boston Depot please arrange travel authorization for Massachusetts.

When I inspected the tannery early in the investigation I found inspectors for the government inspecting hides and accepting certain hides and rejecting others there in the tannery. At their direction hides were so stamped with a government stamp.

Later when I inspected the Shoe Factory in Binghamton where the completed shoe was turned out, I found government inspectors examining the completed shoes. All these men were from the Boston Depot.

Those inspectors inspecting hides were in the tannery inspection department and those who inspected shoes were in the shoe factory.

Very truly yours,

(s) MARY P. HOGUE,
Mary P. Hogue.

376

Plaintiff's Exhibit 11

UNITED STATES OF AMERICA

DIVISION OF PUBLIC CONTRACTS, DEPARTMENT OF LABOR

Number 208

IN THE MATTER OF ENDICOTT JOHNSON CORPORATION

AMENDED COMPLAINT [IN ADMINISTRATIVE PROCEEDINGS]

It having appeared to the Secretary of Labor, upon a preliminary investigation of the matters and things below recited, that Endicott Johnson Corporation, respondent, has at the times and in the manner hereinafter set forth, breached certain provisions of the contracts herein described, and violated the Act of June 30, 1936 (49 Stat. 2036) entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," it is hereby averred and charged:

I. That respondent is, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at Endicott, in the State of New York, and having establishments at Binghamton, Johnson City, and Endicott, all within the State of New York, and is and has been engaged in manufacturing and furnishing the materials, articles, supplies, and equipment set forth in Paragraph II of this complaint.

II. That pursuant to certain invitations to bid, respondent was awarded, by the Government of the United States, the following contracts, upon the dates and for the materials stated:

377	Number of contract	Date	Materials
	W-115-QM-ECW-69	October 26, 1936	Shoes.
	W-115-QM-ECW-68	November 7, 1936	Shoes.
	W-115-QM-ECW-73	January 7, 1937	Shoes.
	W-115-QM-7379	March 20, 1937	Leather Boots.
	W-115-QM-ECW-120	March 20, 1937	Shoes.
	W-115-QM-ECW-124	June 21, 1937	Shoes.
	W-115-QM-ECW-113	June 21, 1937	Leather Boots.
	W-115-QM-ECW-176	June 20, 1937	Shoes.
	Nov-1937	August 21, 1937	Gymnasium Shoes.
	W-115-QM-CIV-30	October 9, 1937	Shoes.
	Nov-1938	March 6, 1939	Gymnasium Shoes.
	W-115-QM-6252	March 26, 1939	Leather Boots.
	W-115-QM-CIV-66	May 15, 1939	Shoes.
	W-115-QM-CIV-118	May 21, 1939	Arctic Overshoes.
	W-115-QM-CIV-120	June 4, 1939	Shoes.

That each of said contracts was for an amount in excess of \$10,000.00, and each of said contracts specifically included the representations and stipulations required by said Act.

III. That prior to the awards of contracts No. W-155-QM-8232, No. W-155-QM-CIV-96, and No. W-155-QM-CIV-125, the Secretary of Labor, in accordance with and under the authority of Sections 1 (b) and 4 of said Act, had determined the prevailing minimum wage for employees engaged in the performance of contracts with the United States Government for the manufacture or supply of men's welt shoes to be forty cents per hour or sixteen dollars per week for a week of forty hours, and that each of contracts No. W-155-QM-8232, No. W-155-QM-CIV-96, and No. W-155-QM-CIV-125 contained a stipulation, as required by Section 1 (b) of said Act, that all persons employed by respondent in performance of said contracts would be paid not less than said minimum wage, without subsequent deduction or rebate on any account.

IV. That during each of the weeks named below respondent permitted and required certain persons employed by it in performance of the contracts named below at its George F. Tabernacle Factory to work in excess of forty hours and has
378 failed and refused to pay said persons for such excess hours the overtime rate of one and one-half times the basic hourly rate of pay received by said persons, as required by said contracts, by Section 1 of said Act and by Articles 1 and 103 of the Regulations of the Secretary of Labor duly promulgated under the provisions of Sections 4 and 6 of said Act, said persons being for the week ending November 7, 1936, on contract No. W-155-QM-ECW-49: Frank Andreyko, Michael Bush, Clarence Buchanan, Walter Bralasky, Paul Beniya, Martin Beblavy, Bruce Crouch, Stanley Carros, Sebastiano Carulli, William Doyle, Peter DeLorme, John Dunnay, John De Angelo, Keath Davenport, Frank Dixon, Louis Di Fulvio, Raymond Funnell, Daniel Elliott, Leslie Farley, Edward Gerdusky, Roy Gunsalus, John Gajda, Sam Gentile, Frank Lasky, Jr., Earl Inman, Paul Kucharek, Harry Kunsman, Charles Lascala, Harold Lake, Joseph Lamonico, Martin Mandak, John C. Messersmith, William Mitrus, Tony Marano, William Mikulski, Nick Micallizzi, Carl McRorie, Glenn Millard, Dominick Morascia, Robert Murtaugh, John Matus, Matthew Neduchal, Jr., Andrew Napela, Peter Porcino, Tony Petrocelli, John Morgan, Andrew Potochniak, Gabriel Murphy, Dan Pantaline, Grover Purdy, Jr., Carmen Romeo, Andrew Romeo, Daniel Stento, Joseph Skrebes, Wells Shupp, Lewis Skrovanek, George Sadlon, Wady Shatara, Ray Mulderig, Mike Morello, Patrick Sullivan, Walter Witort, John Uogentas, John Figura (No. 28657), Thomas Zerblus, John Zucha, Amedeo Zeca,

Tony Zarrelli, Desiato Melfi, Ralph Kirkland, Paul Melkonian, Stephen Kukol, John Hayes, Velma Shafer, Bart Pender, John Curay, Josephine Zonio, Frank Decker, Marion Yeier, Frances Markus, Catherine Colgan, Mabel Winston, Anna Scherhauser, Lillian Thomas, Steve Nedlick, Nellie Thornton, Eva L. Smith, Marie Shedd, Mary Saracno, Grace Strait, Lulu Spencer, Amelia Simolunas, Caroline Spoon, Lena Rider, Lillian
 379 Rockwell, Marian Rose, Mary Pundis, Theresa Pilotti, Anna Pompeii, Charles Peck, Mary Morrissey, Anna Martone, Agnes Maher, Della Moss, Mildred Marascia, Rebecca Mattice, Ellen McCarthy, Helen Lasky, Della Lucas, Joseph Jerome, Louise LaMonica, Agnes Leighton, Nina Lake, Vera Kapicauskas, Hazel Johnson, Minnie Harger, Pearl Harvey, Fannie Gowdy, Genevieve Dugo, Joe Di Rado, Alice Celeste, Isabella Carey, Ivan Bowen, Bruno Balchikonis, Anna Barvaninas, Mabel Atwater, Jane Faubel, Myrtle Durfee, Stephen Drahos, Josephine Guardi, Coy Holland, Charles Hendrickson, Charles Kells, Paul V. Lane, John Lucas, Leon Mallory, Tony Menichelli, Gabriel Onofrio, Dewey Porter, Walter Rodmarmel, Harry Ray, Paul Ribnikar, Arthur Siewers, John Scalone, Wendell Stephens, Abe Unell, George Laski, John Zalkski, Walter Pilotti, John Sedor, Jr., Mildred Mulloy, John Philip, Mary Dunlop, Kenneth Alden, Ralph Bieber, Harry Brown, S. Irving Barrett, Cecil Collett, Thomas Denne, B. Frank Emert, Ralph Fisher, Marcello Fucinato, George Gamble, Charles Green, Dominick Gentile, John Hazen, Toney Lamonica, Charles Laskey, Leslie Morgan, Ira Parker, George Pratt, George Pride, Carmelia Petrola, Americo Regni, Helen A. Stephens, Irene Sebesta, Margaret Tomancik, Josephine Vimislik, Guy Zonio, Pieha Fucinato, Margaret Casper, John Dubrava, Helen Kostecki, Cecil Stephens, Bernard Vill, Harold Gould, Sarah Nycalizzi, Daniel Cippola, Joe Figura, Rose Maxian, Albert Mavio, Regini Pilotti, Emma Allen, James Burke, Bertha Butts, Mary Casey, Mary Cowley, Louis Galli, Anna Horney, John Hogan, Rose Kostecki, Anna Kahanic, Walter Bodom, John Brink, Lavina Barrett, Arthur Drum, John Figura (No. 28812), Henry Felice, Alice Felice, Mark Kapral, Cleveland J. Lake.
 John Leonard, Richard Murtaugh, Thomas Peleggi, Antonio Rigano, Frank Severo, Lester Seal, Joseph Sollitto,
 380 Neil Verba, George Vattae; during the week ending November 21, 1936, on contract No. W-155-QM-ECW-49: Mary Dunlap and John Zeliznok; during the week ending April 17, 1937, on contracts No. W-155-QM-ECW-75, No. W-155-QM-7379, and No. W-155-QM-ECW-120: James P. Green, Mary Scholt, and a person identified by payroll number 28291; during the week ending June 5, 1937, on contracts No. W-155-QM-ECW-75, No. W-155-QM-7379, and No. W-155-QM-ECW-120: Steve

Nedlik, Lillian Thomas, Livia Torricco, Anna Scherhauser, William Wagner, Adeline Wittmier, Edward Buchinsky, Harold Bergman, R. L. Bryant, Blanche Brennon, Mary Betch, Watkins Beddoe, Quirino Cervini, Latretta Burns, Howard Cook, Louis Church, J. V. Cawley, Margaret Diute, John Curray, Caroline Diute, F. T. Danek, A. R. Donovan, Robert Greenblot, Jeff Pace, J. F. Rea, T. J. Ryan, Frank Scully, John Sherwood, Mary Schott, R. E. Rounds, Marder Tootkian, H. C. Tremaine, Helen C. Wood, Paul Wood, Mabel Atwater, Lillian Burke, Frank Danek, Joseph Karker, Helen Miliski, Mildred Marascia, Elnora Peterson, Charles Peck, Thereasa Pillotti, Mary Pundis, Marian Rose, Elizabeth Peterson, Julia Ruspantini, Ethel Stanton, Mary Shute, and Dora Schrader; during the week ending June 12, 1937, on contracts No. W-155-QM-ECW-75, No. W-155-QM-7379, and No. W-155-QM-ECW-120: Charles Peck; during the week ending June 19, 1937, on contracts No. W-155-QM-ECW-75, No. W-155-QM-7379, and No. W-155-QM-ECW-120: Charles Peck and Dora Schroder; during the week ending June 26, 1937, on contracts No. W-155-QM-ECW-75, W-155-QM-7379, and No. W-155-QM-ECW-120: Charles Peck; during the week ending July 17, 1937, on contracts No. W-155-QM-7379, No. W-155-QM-ECW-120, No. W-155-QM-ECW-154, and No. W-155-381 QM-ECW-176: Elizabeth Cordner, and Charles Peck;

During the week ending July 24, 1937, on contracts No. W-155-QM-7379, W-155-QM-ECW-120, W-155-QM-ECW-154, and No. W-155-QM-ECW-176: Charles Peck; during the week ending August 28, 1937, on contracts No. W-155-QM-ECW-120, W-155-QM-ECW-154, and W-155-QM-ECW-176: Anna Barbour; and during the week ending February 12, 1938, on contract No. W-155-QM-CIV-20: Mary Betch; and on contracts No. W-155-QM-CIV-96 and No. W-155-QM-CIV-125, the following persons during the weeks stated: during week ending July 30, 1938, John Fox, Bart Pender, and a person identified by clock number 17209; during week ending October 1, 1938, John Sherwin, Charles Peck, a person named Robinson identified by pay roll number 28472, Steve Medlick, and Julia Harvey; during the week ending October 8, 1938, Bart Pender, Anna Barvinchak, Charles Peck, Clarence Buchanan, John Dunay, Gabriel Murphy, Peter DeLorme, Thomas Rowlands, Julia Harvey, and a person identified by pay roll number 28949, believed to be John Zeleznok.

V. That during the period from April 16, 1938, to October 11 1938, respondent failed and refused to pay to certain persons employed by it at its George F. Tabernacle Factory in performance of contracts No. W-155-QM-8232, No. W-155-QM-CIV-96, and No. W-155-QM-CIV-125, minimum wages of not less than forty

cents per hour or sixteen dollars per week of forty hours as required by said contracts, by Section 1 of said Act, and by Article 1 of said Regulations, said persons being: Harold Alden, Kenneth Alden, Emma Allen, Pearl Ames, Theodore Andreyko, Mabel Atwater, Walter Badon, Hazel Baker, Bruno Balchikonis, Della Baravainas, Anna Barbour, John Bardis, Walter Barleski, Lavina Barrett, Stanley Barrett, Anna Barvinchak, Harry Bates, Mildred Beauparlant, Watkins Beckloe, Ethel Benedict, Clinton Benjamin, Madge Benjamin, Paul Benya, Mary Betch, Ralph Bieber, Walter Bodon, Revere Bonawitz, Ivan Bowen, Charles Boyea, Blanche Brennan, John Brink, Willard Brooker, Harry Brown, Michael Brutvan, Raymond Bryant, Edward Buchinsky, Louise Burdash, Julia Burdick, James Burke, Lillian Burke, Loretta Burns, Michael Bush, Bertha Butts, Vincent Capozzi, Isabel Carey, Stanley Carros, Sebastiano Carulli, Mary Casey, John Cawley, Mary Cawley, Vincent Cawley, Alice Celestel, Querino Servini, Julia Cifrak, Donato Cippola, Magdalena Mikisaukas Citar, Evelyn Clymer, Catherine Colgen, Cecil Collett, Beatrice Coloney, Howard Cooke, Elizabeth Cordner, Louis Costa, Marion L. Carver, Bruce Crouch, Gladys Cuchaira, Edwin Cuddihe, John Curay, Joseph Curran, Frederick Danek, Keith Davenport, Kenneth Davenport, Jennie Dayton, John DeAngelis, Joseph DeAngelis, Louise DeAngelis, Irene Decker, Alfred De Felice, Henry De Felice, Lucy Dekar, John DeLaney, Sr., Peter DeLorme, Thomas Denne, Gladys R. DeVaul, Louis DiFulvio, Joseph DiRado, Caroline Diute, Margaret Diute, Frank Dixon, Gabriel D'Onofrio, Stephen Drahon, Jr., Arthur Drumm, Jr., John Du Brava, Genevieve Dugo, John Danay, Minnie Dunne, Myrtle Durfee, James Eddy, Daniel Elliott, Veral Elliott, Nellie Z. Ellis, Benjamin F. Emert, Frank Emert, Raffale Fabrizio, Jane Faubel, Frances Faughman, Florence Fidium, John Figura, Ralph Fischer, John Fox, Peter Frankowski, Earl French, Marcela Fucinato, Pienia Fucinato, Raymond Funnell, Bert Gabler, Beulah J. Gabler, John Gajda, Luigi Galli, George Gamble, Dominick Gentile, Sabatino Gentile, Edward Gerdusky, Rose Giancarli, Wallace Goodman, Harold Gould, Charles Green, Viola Green, Robert Greenblott, Paul Grinius, Josephine Guardia, Mahlon Gunsalus, Paul Habala, Rose Haftek, Steve Hakos, Helen Hallet, Minnie Harger, Anna Harris, Pearl Harvey, William Hawk, John R. Hayes, John Hazen, Charles Hendrickson, Helen Hill,

382 Anna Hiza, James Hobbs, Frank Hobert, Clayton Hofer, John Hogan, Coy Holland, Elizabeth Holmes, Anna Horney, Helen Houlihan, Earl Inman, Joseph Jerome, William Jindra, Hazel Johnson, George Kadlecik, Rose Kadlecik, Anna Kahanic, Charles Kapicauskas, Vera Kapicauskas, Mary Kapral, Joseph Kar-

383

ker, Stella Kazmark, Loretta Keane, Charles Kells, Lisle Kimble, Albert Kinney, Ralph Kirkland, Michael Kocian, Stella Koplik, Rose Kostecki, Helen Kramnich, Joseph Kubik, Stephen Kugol, Martin Kumpan, Paul Kucharek, Harris Kunsman, Pauline LaGier, Cleveland Lake, Paul Lane, Charles Lascale, Frank Lasky, Jr., George Lasky, Mary D. Lee, John Leonard, Beatrice Lisi, Anthony Lomonica, John Lucas, Helen Luchansky, Jane M. Madigan, Agnes Maher, Julia Major, Leon Mallory, Martin Mandak, Mildred Marascia, Augusta Marbaker, Noah Marderian, Anna Martone, Theresa Mastero, Rebecca Mattice, John Mattus, Albert Mavio, Rose Maxion, Mary Maxson, Ella Mayo, William McAvoy, Ellen McCarthy, John McGuire, Carl D. McRorie, Steve Medlick, Katon Meier, Helen Meleski, Desiato Melfi, Paul Melkonian, Anthony Menichelli, John Messersmith, Sarah Micalizzi, Magdalena Mikisauskas, William Mikulski, Glenn Millard, Rose Miller, John Mokrahajsky, George Mondock, Leslie Morgan, Louella Morgan, Mike Morrello, Della Moss, Mildred Mulloy, Margaret Murphy, Viola Murphy, George Murray, Richard Murtaugh, Robert Murtaugh, Andrew Napela, Thomas Netherton, Matthew Neudchal, Matthew Neduchal, Jr., Pauline Newton, Alfred Nicolai, Vincent Noreika, Florence O'Boyle, Edna Owen, Dan Pantaline, Ira Parker, Paul Pavlic, Frank Payne, Mary Peleggi, Thomas Peleggi, Clifford Pero, Elnora Peterson, Anthony Petrocelli, Carmela Petrola, Joseph Petrovich, John Phillips, Regina Pilotti, Sandi Pinto, Donald Place, Anna Pompeii, Peter Porcino, Aurore Porter, Dewey Porter, Andrew Potochniak, George Pratt, Joseph

384 F. Prekopa, Mary Pundis, Grover Purdy, Harry Ray, Amerigo Regni, Anna Regni, Robert Reynolds, Paul Ribnikar, Lena Rider, Rdean Riffle, Antonio Rigano, Marian Riggs, Robinson (28472), Lillian Rockwell, Walter Rodmarmel, Anthony Rogers, Andrew Romeo, Carmen Romeo, Marian Rose, Rexford Rounds, Nellie Rowlands, William Rowlands, Thomas Ryan, Agnes Ruspantini, Julia Ruspantini, Susie Sadlin, George Sadion, Mary Sarweno, Peter Scalla, John Scalone, Nicola Scarinzi, Minnie Schattell, Anna Scherhauser, Mary Schott, Lester Seal, Bert Scully, Irene Sebesta, John Sedor, Frank Severa, Viola Shafer, Velma Shafer, Wady Shatara, Marie Shedd, John Sherwin, Wells Shupp, Mary Shute, Arthur Siewers, Amelia Simolunas, Peter Skala, Joseph Skrebes, Frank Slavetsky, Agnes Smalding, Eva Smith, Leon Smith, Joseph Sollitto, Mary Sombroski, Lulu Spencer, Caroline Speor, Daniel Stento, Cecil Stephens, Helen Stephens, Wendell Stephens, Nellie Stewart, Grace Strait, Rose Strombel, Lewis Strovaneck, Helen Strugge, Lillian Thomas, Charles Thompson, Merritt Thompson, Nellie Thornton, Margaret Tomancik, Marder Tootkian, Hugh Tremain, Merritt Tuckerman, Paul Treconsky, Livia Torrico, John Uogentas, Michael Uveges,

Frances Valenta, Irma Van Loan, Minnie Van Loan, George Vattee, Bernard Vill, Josephine Vimislik, William Wagner, Edward Warbeck, Michael Weges, Anna Weintraub, Chester Whitman, Lauretta Wilson, Katie Winston, Walter Witort, Helen C. Wood, Paul E. Wood, Mary Young, John Zaleski, Antonio Zarelli, Amadeo Zeca, David Zimmer, Josephine Zonio, John Zucha, and the persons identified by the following pay roll numbers: 1642,

1766, 2503, 3801, 8249, 8266, 13037, 13080, 17209, 25260, 25270, 25279, 25336, 25353, 25550, 25559, 25583, 25616, 25650, 25912, 28202, 28203,

28205 to 28210 inclusive, 28213, 28214, 28219, 28220, 28222,

385 28224, 28229, 28230, 28232, 28233, 28236, 18241, 18245, 18254,

28256, 28270, 28277, 28279 to 28281 inclusive, 28284, 28286,

28296, 28298, 28301, 28303, 28310, 28311, 28313, 28315, 28328, 28351,

28353, 28356 to 28358 inclusive, 28360, 28361, 28363, 28364, 28366 to

28372 inclusive, 28375 to 28377 inclusive, 28379, 28380, 28382, 28387,

28393 to 28395 inclusive, 28399, 28401 to 28406 inclusive, 28408, 28-

422 to 28427 inclusive, 28430, 28432 to 28434 inclusive, 28437, 28438,

28441 to 28443 inclusive, 28445 to 28454 inclusive, 28456, 28458, 28-

460, 28462, 28464, 28465, 28467 to 28472 inclusive, 28474 to 28481 in-

clusive, 28483 to 28487 inclusive, 28490, 28496, 28497, 28499 to 28503

inclusive, 28505, 28507, 28508, 28510 to 28512 inclusive, 28517 to 28-

519 inclusive, 28552, 28554, 28556 to 28560 inclusive, 28562, 28565 to

28567 inclusive, 28570 to 28577 inclusive, 28581, 28584 to 28587 inclu-

sive, 28589 to 28596 inclusive, 28598 to 28602 inclusive, 28605, 28607,

28608, 28610 to 28615 inclusive, 28617, 28618, 28620 to 28622 in-

clusive, 28625, 28628, 28630 to 28638 inclusive, 28644, 28650, 28654,

28656, 28657, 28659 to 28670 inclusive, 28701 to 28703 inclusive

28705, 28707, 28708, 28710, 28711, 28715, 28716, 28719, 28720, 28724

to 28728 inclusive, 28730, 28731, 28737 to 28741 inclusive, 28744,

28745, 28748, 28749, 28751 to 28755 inclusive, 28760, 28764 to 28767

inclusive, 28770, 28771, 28778, 28779, 28781, 28783, 28786, 28787,

28802, 28805, 28810, 28812, 28815, 28819, 28824, 28825, 28827, 28830,

28835, 28837, 28838, 28840 to 28842 inclusive, 28844 to 28847 in-

clusive, 28852, 28854, 28857 to 28862 inclusive, 28865, 28868 to

28876 inclusive, 28880, 28883 to 28885 inclusive, 28887, 28888, 28890,

28891, 28893 to 28895 inclusive, 28899, 28904, 28916, 28918,

386 28922, 28925, 28938, 28949, 28958, 28970, 28972 and 28976; said

failure, with respect to some of said persons, occurring in

each week during said period, and with respect to others of said

persons occurring in less than all of the weeks during said period.

VI. That during the period from October 26, 1936, to on or

about June 18, 1938, respondent maintained contradictory sets of

records of the hours worked by persons employed by it at its

George F. Tabernacle Factory in performance of contracts No.

W-155-QM-ECW-49, No. W-155-QM-ECW-66, No. W-155-

QM-ECW-75, No. W-155-QM-7379, No. W-155-QM-ECW-120,

No. W-155-QM-ECW-154, No. W-155-QM-ECW-153, No. W-155-QM-ECW-176, No. W-155-QM-CIV-20, No. W-155-QM-CIV-96, and No. W-155-QM-CIV-125; that one of said contradictory sets of records consisted of wage statements of the individual employees upon which weekly hours were entered by respondent's payroll office, and the other of such contradictory sets of records consisted of time books kept by foremen which on their faces reflect apparent inaccuracies and omissions but which, if found to correctly record the hours worked by the employees, will reduce substantially but not eliminate completely the extent of the breaches and violations as charged in Paragraphs IV and V hereof.

VII. That during the period from March 15, 1938, to April 4, 1938, respondent permitted and required certain persons employed by it in its Jigger Factory to work in excess of eight hours per day and in excess of forty hours per week while engaged in performance of contract No. Nos-59536, and has failed and refused to pay to such persons for excess hours the overtime rate of one and one-half times the basic hourly rate of pay received by said persons, as required by said contract, by Section 1 of said Act and by

Articles 1 and 103 of said Regulations, said persons
387 being those identified by pay roll numbers 28126, 26901, 27502, 27501, 27242, 27401, 27001, and 27025, and, upon information and belief, other persons whose identities are unknown to the Department of Labor.

VIII. That during the period from May 31, 1938, to September 29, 1938, respondent permitted and required certain persons employed by it in its Sunrise Factory to work in excess of eight hours per day and in excess of forty hours per week while engaged in performance of contract No. W-155-QM-CIV-118, and has failed and refused to pay such persons for such excess hours the overtime rate of one and one-half times the basic hourly rate of pay received by such persons, as required by said contract, by Section 1 of said Act, and by Articles 1 and 103 of said Regulations, said persons being those identified by pay roll numbers 27616, 30083, 30135, 30312, 30390, 30461, 30499, 30572, 30723, 30628, 30691, 30707, 30710, 30716, 30725, 30727, 30860, 30861, 30866, and 30867, and, upon information and belief, other persons whose identities are unknown to the Department of Labor.

IX. Upon information and belief, it is averred and charged that during the period from June 10, 1937, to September 10, 1937, respondent permitted and required certain persons employed by it in its Scout Factory to work in excess of eight hours per day and in excess of forty hours per week, while engaged in performance of contract No. W-155-QM-ECW-153, and has failed and refused to pay to said persons for such excess hours the overtime rate of

one and one-half times the basic hourly rate of pay received by said persons as required by said contract, by Section 1 of said Act, and by Articles 1 and 103 of said Regulations, the
388 identities of said persons being unknown to the Department of Labor.

X. Upon information and belief, it is averred and charged that during the period from August 12, 1937, to December 14, 1937, respondent permitted and required certain persons employed by it in its Jigger Factory or in its Sunrise Factory, or in both such factories, to work in excess of eight hours per day and in excess of forty hours per week, while engaged in performance of contract No. NOS-56487, and has failed and refused to pay to such persons for such excess hours the overtime rate of one and one-half times the basic hourly rate of pay received by such persons as required by said contract, by Section 1 of said Act, and by Articles 1 and 103 of said Regulations, the identities of such persons being unknown to the Department of Labor.

XI. During the period from March 22, 1937, to August 11, 1937, and from March 24, 1938, to June 1, 1938, respondent permitted and required certain persons employed by it in its Calfskin Tannery in performance of contracts No. W-155-QM-7379 and No. W-155-QM-8232, respectively as to said periods, to work in excess of eight hours per day and in excess of forty hours per week and has failed and refused to pay to said persons for such excess hours the overtime rate of one and one half times the basic hourly rate of pay received by said persons, as required by said contracts, by Section 1 of said Act, and by Articles 1 and 103 of said Regulations, said persons being those identified by pay roll numbers 34310, 34450, 34461, 34477, 34478, and 35357.

XII. During the period from October 26, 1936, to September 21, 1938, respondent permitted and required certain persons employed by it in its Upper Leather Tannery to work in excess
389 of eight hours per day and in excess of forty hours per week while engaged in performance of contracts No. W-155-QM-ECW-49, No. W-155-QM-ECW-66, No. W-155-QM-ECW-75, No. W-155-QM-ECW-120, No. W-155-QM-ECW-154, No. W-155-QM-ECW-153, No. W-155-QM-ECW-176, No. W-155-QM-CIV-20, No. W-155-QM-CIV-96, and No. W-155-QM-CIV-125, and has failed and refused to pay to said persons for such excess hours the overtime rate of one and one half times the basic hourly rate of pay received by said persons as required by said contracts, by Section 1 of said Act, and by Articles 1 and 103 of said Regulations, said persons being those identified by pay roll numbers 30972, 31024, 31647, 31650, 31678, 32206, 32207, 32238, 32266, 32477, 32690, 32478, 32479, 32480, 32483, 32484, 32486 to 32489 inclusive, 32492 to 32498 inclusive, 32528 to 32530 inclusive, 32532

to 32535 inclusive, 32537 to 32540 inclusive, 32542 to 32547 inclusive, 32551, 32552, 32556, 32601, 32604, 32606, 32637 to 32653 inclusive, 32655 to 32678 inclusive, 32681, 32683, 32685, 32686, 32687, 32689, 32736 to 32740 inclusive, 32742, 32745 to 32752 inclusive, 32754, 32756, 32787, 32811, 32824, 32904, 32906, 32907, 32909 to 32911 inclusive, 32913 to 32915 inclusive, 32925, 33011 to 33014 inclusive, 33017, 33019 to 33022 inclusive, 33703, 33025, 33026, 33030, 33032, 33034 to 33036 inclusive, 33038 to 33040 inclusive, 33043 to 33047 inclusive, 33051, 33053, 33057, 33061 to 33065 inclusive, 33068, 33070, 33072, 33074, 33076 to 33078 inclusive, 33085, 33086, 33090, 33092 to 33095 inclusive, 33099, 33136 to 33139 inclusive, 33141, 33142, 33144 to 33146 inclusive, 33148 to 33180 inclusive, 33182 to 33187 inclusive, 33190, 33191, 33193, 33194, 33196 to 33205 inclusive, 33207, 33209 to 33212 inclusive, 33214 to 33217 inclusive, 33219 to 33228 inclusive, 33230 to 33236 inclusive, 33238, 33239, 33241, 33243, 33244, 33246, 33351 to 33359 inclusive, 33361 to 33374 inclusive, 33377 to 33379 inclusive, 33381, 33384, 33388, 33389, 33391, 33392, 33394 to 33401 inclusive, 33433, 33434, 33436 to 33438 inclusive, 33469, 33470, 33474, 33476 to 33481 inclusive, 33483, 33485 to 33506 inclusive, 33508, 33511 to 33514 inclusive, 33516 to 33534 inclusive, 33536 to 33538 inclusive, 33541 to 33547 inclusive, 33549 to 33558 inclusive, 33560, 33566 to 33568 inclusive, 33570, 33571, 33573 to 33577 inclusive, 33579, 33582, 33586, 33587, 33589, 33590, 33593, 33601 to 33605 inclusive, 33607 to 33617 inclusive, 33619 to 33624 inclusive, 33626 to 33641 inclusive, 33643 to 33650 inclusive, 33653, 33655 to 33658 inclusive, 33660 to 33662 inclusive, 33666, 33677, 33678, 33015, 33679 to 33683 inclusive, 33686, 33687, 33689, 33690, 33692, 33695, 33696, 33698 to 33702 inclusive, 33704 to 33719 inclusive, 33773, 33780, 33805, 33821, 34004, 34094, 34103, 34149, 35797, 41845, and 43103.

XIII. That during the period from October 26, 1936, to October 11, 1938, respondent permitted and required certain persons employed by it in its Sole Leather Tannery in performance of contracts No. W-155-QM-ECW-49, W-155-QM-ECW-66, W-155-QM-ECW-75, W-155-QM-7379, W-155-QM-ECW-120, W-155-QM-ECW-154, W-155-QM-ECW-153, W-155-QM-ECW-176, W-155-QM-CIV-20, W-155-QM-8232, W-155-QM-CIV-96, and W-155-QM-CIV-125 to work in excess of eight hours per day and in excess of forty hours per week, and has failed and refused to pay to said persons for such excess hours the overtime rate of one and one half times the basic hourly rate of pay received by said persons, as required by said contracts, by

391 Section 1 of said Act and by Articles 1 and 103 of said Regulations, said persons being those identified by payroll numbers 30957 to 30963 inclusive, 30966 to 30971 inclusive, 30974.

30977, 30980 to 30983 inclusive, 30985, 30987 to 30993 inclusive, 30995, 30997, 30998, 31002, 31004, 31005, 31009 to 31012 inclusive, 31016, 31017, 31026, 31027, 31061, 31078, 31087, 31090, 31107, 31108, 31112, 31126, 31129, 31142, 31144, 31150, 31165, 31171, 31172, 31174, 31187, 31191, 31209, 31216, 31285, 31302, 31310, 31311, 31314, 31374, 31378, 31383, 31394, 31413, 31416, 31438, 31551, 31567, 31574, 31576, 31581, 31582, 31586, 31589, 31645, 31649, 33654, 31651, 31652, 31656, 31660, 38194, 31669, 31670, 31675 to 31677 inclusive, 31713, 31716 to 31719 inclusive, 31727, 31730, 31733, 31735, 31740 to 31742 inclusive, 31744 to 31746 inclusive, 31753, 31755 to 31757 inclusive, 31760 to 31762 inclusive, 31770, 31772, 31773, 31775 to 31777 inclusive, 31779, 31780, 31782, 31784, 31789, 31790, 31792, 31793, 31795, 31800 to 31802 inclusive, 31804 to 31809 inclusive, 31812, 31813, 31818, 31821 to 31823 inclusive, 31829 to 31831 inclusive, 31901 to 31903 inclusive, 31906, 31907, 31909, 31911, 31914 to 31916 inclusive, 31918, 31919, 31921, 31924, 31927, 38399, 16015, 35882, 43365, 30993, 31109, 31053, 31667, 31363, 31456, 30792, 31158, 31570, 31807, 33654, 31650, and 30925.

XIV. That during the period from October 26, 1936, to October 11, 1938, respondent permitted and required certain persons employed by it in its Paracord Factory to work in excess of eight hours per day and in excess of forty hours per week while engaged in performance of each of the contracts described in Paragraph II of this complaint, and has failed and refused to pay to said persons for such excess hours the overtime rate of one and one half
 392 times the basic hourly rates of pay received by said persons, as required by said contracts, by Section 1 of said Act, and by Articles 1 and 103 of said Regulations, said persons being those identified by payroll numbers 12552, 12554 to 12556 inclusive, 12570, 12560, 12561, 12578, 12562 to 12566 inclusive, 12568, 12581, 12569, 12572, 12574, 12577, 12584, 12585, 12601, 12587, 12607, 12589, 12590, 12592, 12594, 12600, 17942, 17968, 23801, 23806, 23808, 23812, 23814, 23816, 23819, 23820, 23822, 23824, 23827, 23828, 23832, 23834, 23836, 23837, 23840, 23845, 23847, 23848, 23849, 23851, 23873 to 23875 inclusive, 23877 to 23884 inclusive, 23889, 23900, 23905, 23906, 23908, 23911, 23913, 23916, 23918, 23921, 23922, 23924, 23928, 23932 to 23936 inclusive, 23938, 23941, 23943, 23951, 23954, 23955, 23963, 23965, 23966, 23978, 23980 to 23983 inclusive, 23985, 23987, 23988, 23990, 23992, 23993, 24000 to 24007 inclusive, 24009 to 24011 inclusive, 24014 to 24017 inclusive, 24019, 24020, 24032 to 24038 inclusive, 24044, 24046, 24047, 24054 to 24058 inclusive, 24060, 24066, 24069 to 24071 inclusive, 24078, 24079, 24081, 24086 to 24090 inclusive, 24092, 24097 to 24099 inclusive, 24101, 24102, 24104, to 24107 inclusive, 24109, 24111, 24121, 24122, 24124, 24125, 24128 to 24135 inclusive, 24138, 24141, 24142, 24144, 24145, 24148, 24152, 24154, 24156 to

24159 inclusive, 24162, 24163, 24165, 24166, 24170, 24171, 24176, 24180, 24182, 24183, 24191, 24192, 24201, 24203, 24205, 24207 to 24210 inclusive, 24215, 24231, 24235, 24236, 24240, 24241, 24244, 24245, 24251, 24255, 24264, 24265, 24269 to 24271 inclusive, 24278, 24279, 24281, 24284, 24291, 24301 to 24305 inclusive, 24309 to 24324 inclusive, 24326 to 24331 inclusive, 24333, 24335, 24336, 24358, 24340, 24342 to 24345 inclusive, 24347, 24349, 24360 to 24365 inclusive, 24367, 24368, 24370 to 24373 inclusive, 24375, 24376, 393 24379, 24381 to 24383 inclusive, 24385 to 24391 inclusive, 24404, 24405, 24409, 24411, 24412, 24423, 24426 to 24428 inclusive, 24442, 24443, 24446, 24448, 24451, 24453, 24458, 24460 to 24464 inclusive, 24466, 24472, 24475 to 24478 inclusive, 24480, 24490, 24494, 24495, 24505, 24506, 24508, 24511, 24517, 24521, 24525, 24527, 24528, 24533, 24534, 24546, 24551, 24552, 24554, 24556, 24557, 24564, 24569, 24572 to 24574 inclusive, 24576, 24577, 24585, 24588, 24594, 24595, 24611, 24612, 24620, 24625, 24632, 24635, 24642, 24645, 24647, 24654, 24669 to 24671 inclusive, 24677, 24679 to 24684 inclusive, 24686, 24690, 24691, 24693, 24695, 24696, 24698, 24704, 24709, 24711, 24712, 24714, 24717, 24720, 24722, 24723, 24727 to 24732 inclusive, 24741, 24742, 24745 to 24748 inclusive, 24750, 24752, 24758, 24763 to 24765 inclusive, 24769, 24803, 24806, 24812, 24813, 24820, 24827, 24852, 24853, 24859, 24865, 24876, 24878, 24885, 24901, 24902, 24905, 24906, 24911 to 24914 inclusive, 24920 to 24922 inclusive, 24925, 24926, 24930 to 24933 inclusive, 24937 to 24940 inclusive, 24944, 24948 to 24952 inclusive, 24955 to 24957 inclusive, 24963, 24970 to 24972 inclusive, 24977 to 24981 inclusive, 24988 to 24989 inclusive, 29810, 29812, 29839, 29843, and 29848.

XV. That respondent has failed and refused to make available to authorized representatives of the Secretary of Labor, for inspection and transcription in their entirety the records kept by respondent of the hours and wages of persons employed by it in its Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery, and Paracerd Factory in the performance of the contracts and for the periods respectively set forth in Paragraphs XI, XII, XIII, and XIV hereof, as required by said contracts and by Article 501 of said Regulations: wherefore it is 394 averred and charged, upon information and belief, that persons employed by respondent in said tanneries and factory during the periods specified, other than those identified by pay-roll numbers in said paragraphs, were permitted and required by respondent to work in excess of eight hours per day and in excess of forty hours per week in performance of the contracts and during the periods respectively set forth in Paragraphs XI, XII, XIII, and XIV hereof, and that respondent has failed and refused to pay to said persons for such excess hours the overtime rate of one and one-half times the basic

hourly rate of pay received by said persons as required by said contracts, by Section 1 of said Act, and by Articles 1 and 103 of said Regulations.

XVI. That respondent has failed and refused to make available to authorized representatives of the Secretary of Labor for inspection and transcription such records as respondent has kept of the hours and of wages of persons employed by respondent in the performance of each of the contracts described in Paragraph II of this complaint in respondent's factories, establishments and departments, other than those mentioned in Paragraph XV hereof, engaged in manufacturing middle soles, inner soles, welts, counters, liners, cartons, and other materials manufactured by respondent in performance of said contracts, and engaged in packing and shipping the shoes, boots, and arctics supplied to the Government of the United States as required by said contracts and by Article 501 of said Regulations, wherefore it is averred and charged, upon information and belief, that every person employed by respondent in such factories, establishments, and departments, during the period from October 26, 1936, to October 11, 1938, was permitted and required by respondent to work in excess of eight hours per

day and in excess of forty hours per week in the performance of said contracts, and that respondent has failed and refused to pay to said persons for such excess hours the overtime rate of one and one-half times the basic hourly rate of pay received by said persons as required by said contracts, by Section 1 of said Act and by Articles 1 and 103 of said Regulations, and it is further averred and charged that during the period from April 16, 1938, to October 11, 1938, respondent failed and refused to pay to said persons employed by it in such factories, establishments, and departments in performance of contracts No. W-155-QM-8232, No. W-155-QM-CIV-96 and No. W-155-QM-CIV-125, minimum wages of not less than forty cents per hour or sixteen dollars per week of forty hours as required by said contracts, by Section 1 of said Act, and by Article I of said Regulations, the identities of all persons concerned with the averments and charges of this Paragraph being unknown to the Department of Labor because of said failure and refusal of respondent to make said records available.

XVII. That the aforesaid acts and omissions on the part of respondent constitute breaches of each of said fifteen contracts and violations of said Act whereby respondent has become liable and indebted to the United States in an amount equal to the sum of all of the aforesaid underpayments for excess hours and underpayments of said minimum wages, as provided in Section 2 of said Act; that respondent has become subject to the

396 provisions of said Section 2 authorizing cancellation of said contracts; and that respondent is subject to the provisions of Section 3 of said Act, whereby respondent, and any firm, corporation, partnership, or association in which respondent may have a controlling interest may be excluded from participation in any contract with the United States until three years shall have elapsed from the date of the determination of any such breach or violation.

Wherefore, this amended complaint has been signed and issued this 14th day of November 1939.

[SEAL]

DEPARTMENT OF LABOR.

(S) C. V. McLAUGHLIN,

C. V. McLaughlin,

Assistant Secretary of Labor.

[Defendants' answer to this amended complaint is set forth as Exhibit "A" annexed to the answer in the District Court proceeding]

Plaintiff's Exhibit 12

LEATHER PRODUCED DURING PERIODS OF GOVERNMENT CONTRACTS

OAK SOLE LEATHER PRODUCED

	Pounds
Oct. 26, 1936 to Nov. 30, 1936.....	3, 209, 549
Dec. 1, 1936 to May 30, 1937.....	17, 627, 466
June 1, 1937 to Nov. 30, 1937.....	15, 032, 809
Dec. 1, 1937 to May 30, 1938.....	9, 644, 323
June 1, 1938 to Sept. 21, 1938.....	6, 743, 352
	52, 257, 499
Leather in storage Oct. 27, 1936.....	1, 623, 643
Leather in storage Sept. 27, 1938.....	4, 066, 533
	2, 442, 890

Upper Leather Tannery

	Total production	Army retain
	Feet	Feet
Oct. 26 and 27, 1936.....	212, 710½	
Nov. 1-30, 1936.....	2, 498, 229	231, 556½
Dec. 1, 1936 to May 30, 1937.....	17, 244, 084½	2, 159, 014½
June 1 to Nov. 30, 1937.....	13, 028, 091½	2, 255, 952
Dec. 1, 1937 to May 30, 1938.....	8, 982, 749	2, 088, 302½
June 1, 1938 to Sept. 21, 1938.....	8, 729, 940½	1, 380, 790
	30, 613, 320½	8, 073, 615½
Estimated Eskimo used.....		140, 364
		8, 213, 979½

Or 16.22% of total leather produced.

Calfskin Tannery

	Past	Army box (Past)
Mar. 22-31, 1937.....	689, 025 1/4	
April 1937.....	2, 142, 302	50, 374 1/4
May 1937.....	2, 127, 026	114, 821 1/4
June 1937.....	2, 347, 407	184, 980 1/4
July 1937.....	1, 021, 573 1/4	62, 030
Aug. 1-11, 1937.....	1, 119, 800 1/4	
	10, 357, 029	443, 702 1/4
Mar. 24-31, 1938.....	194, 012 1/4	2, 409 1/4
April 1938.....	1, 452, 340 1/4	311, 341 1/4
May 1938.....	1, 773, 626	50, 672 1/4
June 1, 1938.....	257, 925	
	3, 679, 504	415, 004
	14, 037, 133	589, 365 1/4

1 Or 4.27%

1 Or 3.96%

1 Or 4.19%

398 We attach, herewith, a report showing Government Contracts for shoes made by Endicott Johnson Corporation beginning with Contract #W-155-QM-ECW-49, dated October 26, 1936, and ending with Contract #W-155-QM-CIV-125, dated June 6, 1938, which contracts included a clause as to hours and wages in accordance with the Walsh-Healey Law.

The summary of all the contracts made from the first contract dated October 26, 1936 and the last contract dated June 6, 1938, classified in the total number of pairs of shoes of each type was as follows:

	Pairs
Service Shoes, Special Type "B".....	879, 557
Service Shoes, Special Type "E".....	1, 139, 774
Boots, Leather, Laced, Special Type "J" for Mounted Enlisted Men.....	47, 982
Boots, Leather, Laced, Welt, Logger Type without Calks.....	23, 304

From October 26, 1936, the date of the first Government Contract made by Endicott Johnson Corporation that carried the Walsh-Healey Law in respect to hours and wages, to October 11, 1938, when the final shipment was made on the last contract—#W-155-QM-CIV-125, dated June 6, 1938, the Geo. F. Tabernacle Factory, Washington Street, Binghamton, New York, was manufacturing Government shoes continuously and exclusively.

During this period, one of the contracts included in the list herewith attached—Contract #W-155-QM-ECW-153, dated June 21, 1937—calling for 23,394 pairs Boots, Leather, Laced Welt,

Logger Type without Calks, total value of contract \$97,669.95, final delivery date, September 10, 1937—was made in our Scout Factory, Johnson City.

UPPER LEATHER TANNERY

During the period from October 26, 1936 to September 21, 1938, our Upper Leather Tannery at Endicott was making upper leather continuously for Government Contracts.

During this period they made and shipped to our Upper Leather Department, 8,073,615 feet of Army Retan leather used in Service Shoes Type "B" and Type "E," also made and shipped to our Upper Leather Department, 140,364 feet of Eskimo leather used in Logger Boots without Calks. These two items total 8,213,979 feet of Upper Leather made and used in Government shoes.

During this period from October 26, 1936 to September 21, 1938, the Upper Leather Tannery made and shipped to the Upper Leather Department, 50,613,321 feet of upper leather. The difference between the total amount of leather made by the Upper Leather Tannery during this period of time, and the amount of the total that went into Government shoes, was 42,399,342 feet, which leather was used in Civilian shoes. Therefore, the percentage of leather used in Government shoes to the total amount of leather made during this period of time was .162%.

CALFSKIN TANNERY

During the period from March 22, 1937, to August 11, 1937, and the period from March 24, 1938, to June 1, 1938, the Calfskin Tannery at Endicott made the upper-leather for Contracts: #W-155-QM-7379, dated March 22, 1937, calling for 33,390 pairs, at a value of \$199,672.20—and Contract #W-155-QM-8232, dated March 24, 1938, calling for 14,592 pairs, total value, \$62,599.68—These Contracts calling for Boots, Leather, Laced, Special Type "J" for Mounted Enlisted Men.

The total amount of leather made for Government Contracts as noted above by the Calfskin Tannery was 588,366 feet. During the same period of time that the Calfskin Tannery was making Upper Leather for Government contracts used in Mounted Enlisted Men's Boots, Type "J" they made and shipped to the

Upper Leather Department 14,037,133 feet of all kinds of leather. The difference between the total amount of leather made by the Calfskin Tannery during the respective periods as listed above, and the amount of leather used in Government shoes, was 13,448,767 feet, which leather was used in civilian shoes. Therefore, the percentage of leather used in Government shoes to the total amount of leather made during the period of time that the Calfskin Tannery was making Government leather, was .042%.

SOLE LEATHER TANNERY

Also during this period of time from October 26, 1936, to October 11, 1938, our Sole Leather Tannery at Endicott was making leather continuously for Government Contracts. During this period of time, the total amount of sole leather made by Endicott Johnson Corporation that was used in Government Contracts was 2,477,873 pounds.

Attached, herewith, is report showing total number of pairs of sole leather requirements used in Government contracts, deduction for sole leather requirements bought from outside concerns applying on Government contracts, figures showing reduction from pairs to pounds on the different items, and total of pounds of sole leather made by Endicott Johnson Corporation and used in Government contracts during this period of time.

During this period of time, our Sole Leather Tannery made 49,814,609 pounds of sole leather. The difference between the total amount of sole leather made in the Sole Leather Tannery during this period of time and the amount used in Government Contracts was 47,336,736 pounds, which leather was used in civilian shoes. Therefore, the percentage of leather used in Government shoes to the total amount of leather made during this period of time was .049%.

400 Total Sole Leather Requirements for Government Contracts manufactured by Endicott Johnson Corporation, from October 26, 1936 to September 21, 1938—Also Cut Soles Bought from Outside Manufacturers—Also Average Weight per Dozen Pairs of the different items based on size shoe 8½E, representing the average—Also the Pairs of the different items reduced

to pounds—Also total pounds of Sole Leather used in Government Contracts:

	No. pairs	Pairs bought outside	Pairs produced from E. J. leather	Average weight per dozen pair	Pounds of E. J. lea. used
Lea. Outsoles:					
"B"	879,557				
"J"	47,982				
Logger	23,394				
	950,933	139,362	811,571	8 lb. 5½ oz	564,295
Insoles:					
"B"	879,557				
"J"	47,982				
Logger	23,394				
"E"	1,139,774				
	2,080,707	914,563	1,176,144	5 lbs.	490,012
6 M Soles: "E"	1,139,774		1,139,774	5 lbs. 4½ oz	501,573
7 M Soles:					
"B"	879,557				
Logger	23,394				
	902,951	237,825	665,126	6 lbs. 1½ oz	337,709
Filler:					
"B"	879,557				
"J"	47,982				
Logger	23,394				
	2,042,725	17,215	2,025,510	1 lb. 6 oz	232,047
Counter:					
"B"	879,557				
"J"	47,982				
"E"	1,139,774				
	2,067,313	190,667	1,877,656	2 lb. 2 oz	332,457
Heel Bases: "J"	47,982		47,982	2 lb. 6 oz	9,557
Whole Lift Heel not inc top lift	23,394		23,394	5 lb. 3 oz	10,173
Total					2,477,879

0.049% of total Sole Leather produced.
Sole Leather produced, 49,814,600 lbs.

401 Government Contracts for Shoes made by Endicott Johnson Corporation under Walsh-Healey Law, beginning October 26, 1936, and ending June 6, 1938:

Contract #W-155-QM-ECW-49, dated October 26, 1936: Service Shoes, Special Type "B," 48,720 pairs, \$130,813.20. Complete Jan. 24, 1937.

Contract #W-155-QM-ECW-66, dated Nov. 10, 1936: Service Shoes, Special Types "B" & "E," Type "B," 133,524 pairs; Type "E," 182,256 pairs, \$759,801.72. Complete before March 30, 1937.

Contract #W-155-QM-ECW-75, dated January 7, 1937: Service Shoes, Special Type "E," 122,856 pairs, \$308,675.70. Complete June 30, 1937.

Contract #W-155-QM-7379, dated March 22, 1937: Boots, Leather, Laced, Special Type "J" for Mounted Enlisted Men, 33,390 pairs, \$199,672.20. Complete Aug. 14, 1937.

Contract #W-155-QM-ECW-120, dated March 25, 1937: Service Shoes, Special Type "B" & "E," Type "B," 82,656 pairs; Type "E," 250,005 pairs, \$941,691.14. Complete Type "B" Sept. 1, 1937. Complete Type "E" Sept. 21, 1937.

Contract #W-155-QM-ECW-153, dated June 21, 1937: Boots, Leather, Laced, Welt, Logger Type without-Calks, 23,394 pairs, \$97,669.95. Complete Sept. 10, 1937.

Contract #W-155-QM-ECW-154, dated June 21, 1937: Service Shoes, Special Type "B," 30,000 pairs, \$91,800.00. Complete Sept. 10, 1937.

Contract #W-155-QM-ECW-176, dated June 30, 1937: Service Shoes, Special Types "B" & "E," Type "B," 86,516 pairs; Type "E," 86,516 pairs, \$488,815.40. Complete Jan. 8, 1938.

Contract #W-155-QM-8232, dated March 24, 1938: Boots, Leather, Laced, Special Type "J" for Mounted Enlisted Men, 14,592 pairs, \$54,938.88. Complete June 15, 1938.

Contract #W-155-QM-CIV-20, dated October 9, 1937: Service Shoes, Special Types "B" & "E," Type "B," 299,751 pairs; Type "E," 299,751 pairs, \$1,617,824.18. Complete April 20, 1938.

Contract #W-155-QM-CIV-96, dated May 16, 1938: Service Shoes, Special Types "B" & "E," Type "B," 123,390 pairs; Type "E," 123,390 pairs, \$520,705.80. Complete Dec. 31, 1938.

Contract #W-155-QM-CIV-125, dated June 6, 1938: Service Shoes, Special Type "B," 75,000 pairs; Type "E," 75,000 pairs, \$300,000.00. Complete Dec. 31, 1938.

402 Total Rubber Requirements for Government Contracts manufactured by Endicott Johnson Corporation, from October 26, 1936, to September 21, 1938—Average weight per pair of the different items based on size shoe 8½E, representing the average—Also the pairs of the different items reduced to pounds—Also total pounds of rubber used in Government contracts:

	Pounds
Cord Sole, 1,139,778x19.76 Oz. Pr.....	1,407,625
Rubber Heel, 1,139,778x8.37 Oz. Pr.....	596,246
Top lift, 47,982x6.18 Oz. Pr.....	18,533
	<hr/> 2,022,404

.034%.

Total lbs., 58,940,535.

Plaintiff's Exhibit 13

UNITED STATES OF AMERICA

DIVISION OF PUBLIC CONTRACTS

DEPARTMENT OF LABOR

IN THE MATTER OF ENDICOTT JOHNSON CORPORATION

U. S. POSTOFFICE BLDG.,

BINGHAMTON, N. Y.,

Wednesday, December 13, 1939.

Met pursuant to notice at 10:00 o'clock A. M.

Before WILLIAM A. McILWAINE, Examiner.

Appearances: Clifford P. Grant, Attorney for the Government.
William H. Pritchard, Attorney for the Respondent.

PROCEEDINGS

Mr. GRANT. If it may please the Examiner, prior to the hearing being set for today, and during the course of the investigation conducted by the Division of Public Contracts of the Department of Labor, I was a representative of the Department of Labor, for the purpose of determining whether or not the company had complied with the requirements of the Public Contracts Act and the regulations of the Secretary of Labor in the performance of the fifteen contracts that had been awarded to the company subject to the Act, and in the event there was non-compliance, to determine the extent of that non-compliance.

Mr. Swartwood, as Secretary and as spokesman for the corporation, made it known that certain of the books and records were to be no longer available to the inspectors and that they were not to have any further access to them. However, at that time a partial examination of those records and books had been made sufficient to show that employees in the plants and factories involved had worked in excess of eight hours per day and forty hours per week without the payment of time and a half and in certain instances that the minimum wage had not been paid according to certain of those records.

On the facts revealed by the partial examination of the books and records and the investigation as far as it progressed, we felt that we had sufficient evidence to issue a complaint and a
405 formal complaint was issued at the direction of the Secretary of Labor charging the company with the breach of its contracts, because after all the requirements of the Act are

made a part of the contracts, and charging it with breach of its contracts and with violation of the Act.

Because of the fact that Mr. Swartwood also made it known to representatives of the Department, including myself, that the position of the corporation would be that we were not entitled to those records, that in furtherance of that position they, the corporation, intended to refuse to produce certain records at this hearing. Subpenas have been issued for the complete records showing the wages and hours of employees engaged in the various plants and factories in the performance of these fifteen contracts, so at the outset, in order to ascertain the present attitude of the corporation and the extent of its inclination or disinclination to produce those records that have been subpoenaed, I would ask that Mr. Swartwood be sworn as a witness and that I be permitted to inquire of him certain preliminary matters and as to the matter that I have just related.

HOWARD A. SWARTWOOD was thereupon called as a witness on behalf of the Government and, having been first duly sworn by the Examiner, testified as follows:

Direct examination by Mr. GRANT:

Q. What is your full name?

A. Howard A. Swartwood.

406 Q. Mr. Swartwood, you are Secretary of the Endicott Johnson Corporation?

A. Yes, sir.

Q. And the Endicott Johnson Corporation is a corporation, is it?

A. Yes, sir; organized under the laws of the State of New York.

Q. Approximately what year?

A. It was incorporated April 1, 1919.

Q. And who are the other officers of the corporation?

A. Mr. George F. Johnson is Chairman of the Board; Mr. George W. Johnson is the President; Mr. Charles F. Johnson, Jr., is the First Vice President and General Manager; Mr. Lawrence Merle is the Second Vice President; Mr. Bruce L. Babcock is the Treasurer, and I am the Secretary. There are other officers such as Assistant Secretaries and Treasurers and Auditors, but they are so numerous that I don't think it is necessary to state those for the record.

Q. I don't think that would be necessary. Might I ask if the officers compose the Board of Directors or are there Directors outside of the officers?

A. I am not a Director, but all of the other officers I have named are members of the Board of Directors.

Q. Are there any other Directors who are not officers?

A. Yes, sir.

407 Q. Are they few in number?

A. I will have to name them. Mr. Jewett Neeley is a Director of the corporation and not an officer; Mr. Ray Mills is a Director of the corporation and not an officer; Mr. Leonard Steed is a Director and not an officer; Mr. Henry S. Bowers is a Director and not an officer; and Mr. Ralph B. Clark is a Director and not an officer.

Q. What is the principal business of the corporation?

A. The corporation is a manufacturer of canvas, leather, and rubber footwear; it is a manufacturer of leather; it is a manufacturer of rubber, rubber soles and heels; it is a manufacturer of cut soles, leather soles; a manufacturer of counters, and a manufacturer of shoe cartons.

Q. Of these commodities, Mr. Swartwood, other than the shoes themselves, does the corporation, let us say, tan hides and manufacture such other commodities as counters for sale to other shoe manufacturers, or is all of that manufactured for the purpose of the corporation?

A. On the leather we have one customer in Boston to whom we sell leather and from which stock he distributes to various New England manufacturers. We have one customer I think for rubber soles and heels and I think we sell one or two customers small amounts of counters. As far as I know we sell no cut soles to any outside customers.

Q. The central offices of the corporation are located at Endicott, are they?

408 A. Yes, sir.

Q. And the officers have their offices in the Sales Building there at Endicott?

A. The principal offices are in the Sales Building at Endicott.

Q. Are you prepared, Mr. Swartwood, to give us the name and location of your various plants and factories?

A. I am prepared to give you the names and locations of all that are involved in these contracts.

Mr. GRANT: Very well. Perhaps first then I might ask Mr. Swartwood to introduce these fifteen contracts of which I have certified copies, so that we can handle the contracts as Mr. Swartwood discusses the various plants. [Mr. Swartwood examined the certified copies of the contracts handed to him by Mr. Grant.]

Q. Mr. Swartwood, those contracts that you have just examined, is there any objection to their being introduced as Government exhibits?

A. I have no objection. I have examined the dates and numbers and assume they are correct copies of the contracts. I know that they are the correct contract numbers and dates and I have no objection to their introduction as exhibits.

Mr. GRANT: Mr. Examiner, I would like at this time to introduce the certified copies of the fifteen contracts which are the subject matter of the amended complaint, being listed in Paragraph 2 of the amended complaint. These copies are
409 certified by the Comptroller General of the United States who is the custodian of the originals of the contracts. For the purpose of the record I am going to list the contracts in their date order and in the order in which they are listed in Paragraph 2 of the complaint.

I will ask that Contract No. W-155-QM-ECW-49, dated October 26, 1936, be received as Government Exhibit No. 1; Contract No. W-155-QM-ECW-66, dated November 10, 1936, as Government Exhibit No. 2; Contract No. W-155-QM-ECW-75, dated January 7, 1937, as Government Exhibit No. 3; Contract No. W-155-QM-7379, dated March 22, 1937, as Government Exhibit No. 4; Contract No. W-155-QM-ECW-120, dated March 25, 1937, as Government Exhibit No. 5; Contract No. W-155-QM-ECW-154, dated June 21, 1937, as Government Exhibit No. 6; Contract No. W-155-QM-ECW-153, dated June 21, 1937, as Government Exhibit No. 7; Contract No. W-155-QM-ECW-176, dated June 30, 1937, as Government Exhibit No. 8; Contract No. 56487, dated August 23, 1937, as Government Exhibit No. 9; Contract No. W-155-QM-CIV-20, dated October 9, 1937, as Government Exhibit No. 10; Contract No. 59536, dated March 8, 1938, as Government Exhibit No. 11; Contract No. W-155-QM-8232, dated March 24, 1938, as Government Exhibit No. 12; Contract No. W-155-QM-CIV-96, dated May 16, 1938, as Government Exhibit No. 13, Contract No. W-155-QM-CIV-118, dated May 31, 1938, as Government Exhibit No. 14; and Contract W-155-QM-CIV-125, dated June 6, 1938, as Government Exhibit No. 15. I
move that they be received in evidence.

410 Examiner McILWAIN. If you have no objection, Mr. Swartwood, they will be so received.

(The contracts, herein above referred to and described, were thereupon received in evidence and marked as "Government Exhibits Nos. 1 to 15," respectively.)

[These exhibits are the same as Plaintiff's Exhibits 1-A to 1-O in the District Court proceeding.]

Mr. GRANT. They are the contracts that were awarded to the Endicott Johnson Corporation!

A. Yes, sir.

Q. And I think you answered that they contain the representations and stipulations of the Public Contracts Act?

A. Yes, sir.

Q. Now, Mr. Swartwood, can you give us, as you indicated, the location and designation or identification of the various plants and departments in which these contracts were performed?

A. Well, the first contract, which has been marked "Government Exhibit No. 1," and Contract No. W-155-QM-ECW-49, was performed in the George F. Tabernacle Factory at Binghamton, N. Y. It was for 48,720 pairs of shoes, "Service, Special Type 'B'." Work on this contract was commenced October 29, 1936, and was actually completed January 22, 1937. "Government Exhibit No. 2," Contract W-155-QM-ECW-66, dated November 10, 1936, was performed in the George F. Tabernacle Factory at Binghamton, N. Y. and was for 133,524 pairs of shoes, "Service, Special Type 'B'." and 182,256 pairs of shoes, "Service, Special Type 'E'." Work on this contract was commenced

411 November 16, 1936, and the contract was actually completed March 30, 1937. "Government Exhibit No. 3," Contract No. W-155-QM-ECW-75, dated January 7, 1937, was performed in the George F. Tabernacle Factory at Binghamton, N. Y., and was for 122,856 pairs of shoes "Service, Special Type 'E'." Work on this contract was commenced March 12, 1937 and actually completed May 19, 1937. "Government Exhibit No. 4," Contract No. W-155-QM-7379, dated March 22, 1937, was performed in the George F. Tabernacle Factory at Binghamton, N. Y., and was for 33,390 pairs of boots known as "Boots, leather, laced, Special Type 'J' for mounted enlisted men." Work on this contract was commenced April 19, 1937, and actually completed August 11, 1937.

"Government Exhibit No. 5," Contract No. W-155-QM-ECW-120, dated March 25, 1937, was performed at the George F. Tabernacle Factory at Binghamton, N. Y., and was for 82,656 pairs of shoes "Service, Special Type 'B'." and 250,006 pairs of shoes, "Service, Special Type 'E'." Work on this contract was commenced April 19, 1937, and actually completed September 20, 1937. "Government Exhibit No. 6," Contract No. W-155-QM-ECW-154, dated June 21, 1937, was performed in the George F. Tabernacle Factory at Binghamton, N. Y., and was for 30,000 pairs of shoes, "Service, Special Type 'B'." and work was commenced on this contract June 17, 1937, and actually completed September 9, 1937. "Government Exhibit No. 7," Contract No. W-155-QM-ECW-412 153, dated June 21, 1937, was performed in the Scout Factory, Johnson City, N. Y., and was for 23,394 pairs of "Boots, leather, laced, welt, logger type, without caulks." Work was commenced on this contract June 16, 1937, and actually completed September 10, 1937.

"Government Exhibit No. 8," Contract No. W-155-QM-ECW-176, dated June 30, 1937, was performed in the George F. Tabernacle Factory, Binghamton, N. Y., and was for 86,516 pairs of shoes, "Service, Special Type 'B'" and 86,516 pairs of shoes, "Service, Special Type 'E'." Work was commenced on this contract August 23, 1937, and actually completed November 23, 1937. "Government Exhibit No. 9," Contract No. 56487, dated August 23, 1937, was performed in the Jigger Factory at Johnson City, N. Y., and was for 20,000 pairs of "Gymnasium Shoes." Work on this contract was commenced August 24, 1937, and completed September 14, 1937. However, due to some defect they were remade and the remaking commenced October 14, 1937, and was completed November 17, 1937.

"Government Exhibit No. 10," Contract No. W-155-QM-CIV-20, dated October 9, 1937, was performed in the George F. Tabernacle Factory at Binghamton, N. Y. It was for 299,751 pairs of shoes, "Service, Special Type 'B'" and 299,751 pairs of shoes "Service, Special Type 'E'." Work on this contract commenced October 15, 1937, and was actually completed April 19, 1938. "Government Exhibit No. 11," Contract No. 59536, dated March 8, 1938, was performed in the Jigger Factory at Johnson City, N. Y., and was 14,150 pairs of "Gymnasium Shoes."

Work on this contract commenced March 15, 1938, and was actually completed April 4, 1938. "Government Exhibit No. 12," Contract No. W-155-QM-8232, dated March 24, 1938, was performed in the George F. Tabernacle Factory at Binghamton, N. Y., and was for 14,592 pairs of "Boots, leather, laced, Special Type 'J'" for mounted enlisted men. Work was commenced on this contract April 11, 1938, and was actually completed June 1, 1938.

"Government Exhibit No. 13," Contract No. W-155-QM-CIV-96, dated May 16, 1938, was performed in the George F. Tabernacle Factory at Binghamton, N. Y., and was for 123,390 pairs of shoes, "Service, Special Type 'B'" and 123,390 pairs of shoes, "Service, Special Type 'E'." Work on this contract commenced May 11, 1938, and was actually completed October 11, 1938. "Government Exhibit No. 14," Contract No. W-155-QM-CIV-118, dated May 31, 1938, was performed in the Sunrise Factory at Johnson City, N. Y., and was for 8,000 pairs of "Overshoes, Arctics, rubber top, Class 'B'." Work was commenced on this contract May 31, 1938, and actually completed August 30, 1938. "Government Exhibit No. 15," Contract No. W-155-QM-CIV-125, dated June 6, 1938, was performed in the George F. Tabernacle Factory at Binghamton, N. Y., and was for 75,000 pairs of shoes, "Service, Special Type 'B'" and 75,000 pairs of shoes "Service, Special Type 'E'." Work was commenced on this contract June 6, 1938, and was

actually completed October 11, 1938. All of the contracts I have mentioned were for amounts in excess of ten thousand dollars.

414 Q. Now the factories that you have identified here in which these contracts were performed, Mr. Swartwood, are the factories in which the shoes were manufactured?

A. The factories in which the articles described in the specifications of the contracts were manufactured.

Q. And the same applies of course to the beginning and the completion dates? That covers that particular plant and doesn't apply to any auxiliary operations at all?

A. That is correct.

Q. Can you tell us what auxiliary operations were performed in other plants of the factory in the manufacture of the commodities specified in the contracts?

A. It is our contention that no other operation was performed in any other plant in these contracts and no other person engaged in any other place, except the factories I have enumerated, was at any time engaged in the performance thereof.

Q. I think that is already made clear by their answer and I think perhaps that the question that I had asked is already answered by the averments of the answer of the company. So there is no particular necessity of making a repetition of the other operations incidental or necessary in the operations under these contracts. Of course it is the contention of the Government that such other operations as the tanning of the hides, the cutting of soles, the manufacture of counters and other operations of that type in which materials were manufactured, that went into the Government shoes, are subject to the Act and to the requirements of the Act.

415

Examiner McILWAINE. If Mr. Swartwood knows this about the articles used to make up these various shoes and overshoes and boots, and when these operations were commenced and ended, I would like to know that.

Mr. GRANT. You are speaking now with reference to the tanneries in which the leather was tanned and the rubber was produced, etc.?

Examiner McILWAINE. Yes.

Mr. GRANT. Are you prepared to furnish that information, Mr. Swartwood?

A. No, sir.

Examiner McILWAINE. Mr. Swartwood, how long would it take you to be prepared to furnish that information? I understand that your contention is that certain things, certain supplies or materials used in filling the Government orders in making up these shoes, were not subject to the contract. I understand that,

but for my own record in making my report, if you can and when you can furnish this information, I would like to have it.

A. I am sure we can furnish the information, but as I understood the purpose of this hearing this morning, it was not to go into those questions. The sole question to be thrashed out at this hearing was to raise the contention in order that we could get a court decision as to whether or not the operations in these auxiliary departments were covered by the stipulations of the Act contained in the contracts to manufacture footwear of the character described in the specifications of these particular contracts.

Mr. GRANT. That is perhaps substantially true, Mr. Swartwood, but I think what the Examiner has in mind is that if the court does hold that those operations are subject, then perhaps there should be on record the dates and the particular plants and factories covering those particular commodities.

Examiner McILWAINE. In other words, Mr. Swartwood, I will say this right here. As I understand it you have no objection to producing the record of the hours worked each day and each week and the rates paid and the amount paid each pay period, etc., relative to the work done in these various and sundry factories, principally the Tabernacle Factory, and the Scout Factory and Sunrise Factory, the work performed in these factories and the time enumerated by you. That is, for instance, in the first contract the wages and hours for October 29, 1936; to January 22, 1937.

A. We have made the record available and it has been inspected by at least five representatives of the Department of Labor, Division of Public Contracts. The records have been inspected during the course of the performance of the contract and since.

417 Examiner McILWAINE. However, as far as I am concerned, I have got to at some time or other, before this thing is ended, write the Examiner's opinion. In doing so I am guided by certain rules and regulations, and there is a regulation that "When a contractor to whom a contract subject to the Act is awarded operates an integrated establishment which manufactures or produces materials or supplies that are incorporated into or otherwise used in the manufacture or supply of the materials, supplies, articles, or equipment called for by the contract, the Act is applicable to those departments which are engaged in the manufacture or production of the materials or supplies to be so incorporated into or used in the manufacture or processing of the ultimate product to be delivered to the Government as well as to the employees engaged in the manufacture or processing of that ultimate product." You have the right, of course, to go into the

U. S. Court, when a motion is made there, to produce those records and argue your point there, but in order for me to make up my record, I would like you to give me the dates on this other work. I, therefore, request at this time that you give me those dates relative to that work.

A. I haven't the dates, and on the ground that the ruling which you have just read is arbitrary, artificial, capricious, and unreasonable, we refuse to produce the records of the tanneries, rubber mills, carton department, sole-cutting department, or to make any testimony with reference thereto at this hearing.

Examiner McILWAIN. You refuse to give those dates?

A. Yes, sir; I make that refusal.

Mr. GRANT. I intended, Mr. Examiner, to lay just a bit more of a foundation. Mr. Swartwood is perhaps anticipating my request, but I want to point out, Mr. Swartwood, that you have answered and have said that for all of the leather on the shoe and boot contracts you tanned your own hides?

A. That is correct.

Q. And used your own leather?

A. That is correct.

Q. That went into those twelve shoe and boot contracts?

A. That is right. It is so stated in the Answer.

Q. That in addition to the tanning of the hides and leather; you cut your own leather outer soles, middle soles, and inner soles?

A. Yes, sir.

Q. In addition to the ones you cut you also purchased some of the soles?

A. Yes.

Q. Was that alleged in the Answer?

A. Yes; it is so stated.

Q. And that all of the rubber heels and soles used in the manufacture of the leather shoes under the twelve leather boot and shoe contracts were manufactured in your Paracord factory; that the cutting of the outer soles, middle soles, and inner soles, that a portion of them were manufactured or cut in your sole-cutting department at Endicott, some cut in your sole-cutting department in Johnson City and the balance purchased from other suppliers.

A. That is correct.

Q. I don't believe the Answer specifies the particular tanneries involved on each of the contracts.

A. Well, I couldn't say, but I think I can testify to that.

Q. Let me ask you this again. Your Answer further alleges that all of the welting used in the manufacture of the leather

shoes under the twelve contracts were purchased from outside suppliers?

A. That is correct. We have no welting mill at all.

Q. All of the cartons used in shipping the leather shoes, boots, gymnasium shoes and Arctic overshoes to the Government under all of the fifteen contracts were manufactured in your carton departments?

A. At Johnson City and Endicott.

Q. The Answer simply alleges "in the carton department at Johnson City." That is at the top of page 4 of your Answer.

A. That is correct. The cartons were all manufactured in Johnson City, although we do have a department at Endicott.

Q. And you have further answered that none of the 420 leather shoes under the twelve boot and shoe contracts contained linings of any kind?

A. That is right, except the logger boots which were made in the Scout Factory at Johnson City, under Contract No. W-155-QM-ECW-153, which contained leather linings and these linings were cut right in the Scout Factory where the shoes were made, and the period that I have given you for the commencement and completion of that contract would cover the cutting of all the leather linings of those shoes.

Q. Summarizing, Mr. Swartwood, were there any other auxiliary functions or operations, that you have contended are not subject to the Act, performed other than the tanning of the leather, cutting of the outer soles, middle soles and inner soles, the manufacture of rubber heels and soles, the manufacturing the counters, the manufacture of the cartons and the manufacture of the leather linings under the one contract you have just specified? Are there any other or were there any other auxiliary operations, if you can term them that, performed under these fifteen contracts?

A. Not to my knowledge. And the cutting of the leather linings would not be an auxiliary operation but was part of the manufacture of the boots themselves.

Q. You are not contending that the leather would not be subject to the Act?

A. No, that is a part of the contract calling for the logger boots made in the Scout Factory.

421 Q. And the manufacture of those leather linings of course came within the period that you gave for the performance of that contract; in other words from June 16, 1937, to September 10, 1937?

A. Yes.

Q. As you have testified in response to the Examiner's question, you don't have the dates in which these various auxiliary functions were performed in your various auxiliary plants?

A. No.

Q. Do I understand that your refusal to produce the records covers your refusal to supply those dates also?

A. Yes; at this time. If the Court finally holds that these operations are subject to the stipulations of the Walsh-Healey Act contained in the shoe contracts, then is the time I think that we will be compelled to produce it and we will do so.

Examiner McILWAINE. In other words they can be produced?

A. Oh, yes; we can do that, but I don't think this is the time, under my refusal, to produce the records.

By Mr. GRANT:

Q. Can you tell us, Mr. Swartwood, speaking now of the footwear factories, the George F. Tabernacle Factory, the Jigger Factory, the Sunrise Factory, and Scout Factory, can you tell us, at the time these contracts were going through those particular plants, what method of recording employees' wages and time was used?

A. Well, I could tell you as to the George F. Tabernacle Factory, but I don't know that I can tell you the method that was used in the Jigger or Sunrise or Scout Factory, although I assume it is the same. The time or hourly workers in the George F. Tabernacle Factory rang time cards. The piece workers rang no time cards at that time and their wage statements were made up by the foremen showing the numbers of hours that they worked and they enclosed in this wage statement the piece-work coupons which they had, the operations of which they had completed during the week, and those were sent to the central pay roll office and figured for their weekly pay. The foremen in those rooms kept a time book which indicated the number of hours that the various piece workers worked during that period.

Q. You have heretofore furnished a typewritten statement of some eleven pages on the method of keeping pay roll records and paying wages in the George F. Tabernacle Factory, Mr. Swartwood?

A. That is correct.

Q. And of course you have just given us a general statement here, but any details can be found in this statement that I have just referred to?

A. That is correct. The description of that pay roll system in the George F. Tabernacle Factory, as included in that eleven-page memorandum is the complete detailed

method of keeping the records in that factory during the period of these contracts.

Q. And as far as you know the same system was followed in the Jigger, Sunrise, and Scout Factories at the dates mentioned?

A. As far as I know, but I am not prepared to state that. It would be the same or a similar system.

Q. Now, Mr. Swartwood, have you been served with a subpoena issued at the direction of the Secretary of Labor to produce certain records at the hearing this morning?

A. Yes; I was served with a subpoena, personally and on behalf of the company to produce certain records, on December 7, 1939 by the U. S. Marshal.

Q. You say personally and on behalf of the company. Were you served two subpoenas?

A. Yes; one was directed to Howard A. Swartwood, Secretary, and the other directed to the Endicott Johnson Company.

Q. And both of those subpoenas were served on you December 7, 1939?

A. Yes, sir.

Mr. GRANT. Mr. Examiner, both of the subpoenas list the identical books and records to be produced.

Q. In response to those subpoenas, Mr. Swartwood, have you produced or are you ready to produce the books and records mentioned in those subpoenas?

A. In connection with the company's contention that the stipulations of the Walsh-Healey Act, contained in the footwear contracts, do not apply to any operations in plants other than those in which the footwear was manufactured, I have prepared a memorandum with respect to the subpoena which I would like to read in answer to your question.

Mr. GRANT. May I say before Mr. Swartwood reads this statement, Mr. Examiner, that at the time I left Washington yesterday the returns by the U. S. Marshal of the originals, with his proof of service entered thereon had not been received and I would like to have it understood that when they are received they shall be entered as Government Exhibit Nos. 16 and 17, and so considered by the Examiner as part of the record.

The WITNESS. The subpoenas duces tecum issued by C. V. McLaughlin, Assistant Secretary of Labor, to Endicott Johnson Corporation and to Howard A. Swartwood, secretary, require the production at this hearing of three separate and distinct classes or groups of pay-roll records.

The first class or group of pay-roll records required to be produced under such subpoenas contains:

(a) Records of George F. Tabernacle Factory at Binghamton, N. Y., in which Endicott Johnson Corporation
425 manufactured and furnished to the United States Government men's leather welt shoes and boots under the following contracts:

1. Contract No. W-155-QM-ECW-49, the specifications of which described the general character of such shoes as "Service, Special Type 'B'."

2. Contract No. W-155-QM-ECW-66, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

3. Contract No. W-155-QM-ECW-75, the specifications of which described the general character of such shoes as "Service, Special Type 'E'."

4. Contract No. W-155-QM-7379, the specifications of which described the general character of such boots as "Boots, leather, laced, Special Type 'J' for mounted enlisted men."

5. Contract No. W-155-QM-ECW-120, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

6. Contract No. W-155-QM-ECW-154, the specifications of which described the general character of such shoes as "Service, Special Type 'B'."

7. Contract No. W-155-QM-ECW-176, the specifications
426 of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

8. Contract No. W-155-QM-CIV-20, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

9. Contract No. W-155-QM-8232, the specifications of which described the general character of such boots as "Boots, leather, laced, Special Type 'J' for mounted enlisted men."

10. Contract No. W-155-QM-CIV-96, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

11. Contract No. W-155-QM-CIV-125, the specifications of which described the general character of such shoes as "Service, Special Type 'B'" and "Service, Special Type 'E'."

(b) Records of Scout Factory at Johnson City, N. Y., in which Endicott Johnson Corporation manufactured and furnished to the United States Government men's leather welt boots under Contract No. W-155-QM-ECW-153, the specifications of which described the general character of such boots as "Boots, leather, laced, welt, logger type, without caulks."

427 (c) Records of Jigger Factory at Johnson City, N. Y., in which Endicott Johnson Corporation manufactured and furnished to the United States Government canvas footwear under the following contracts:

1. Contract No. 56487, the specifications of which described the general character of such canvas footwear as "Gymnasium Shoes."

2. Contract No. 59536, the specifications of which described the general character of such canvas footwear as "Gymnasium Shoes."

(d) Records of Sunrise Factory at Johnson City, N. Y., in which Endicott Johnson Corporation manufactured and furnished to the United States Government rubber footwear under Contract No. W-155-QM-CIV-118, the specifications of which described the general character of such rubber footwear as "Overshoes, Arctics, rubber top, Class 'B'."

During the performance and since the performance of all of the contracts I have mentioned for the furnishing of leather shoes and boots, gymnasium shoes, and arctic overshoes, all of the payroll records of George F. Tabernacle Factory, Scout Factory, Jigger Factory, and Sunrise Factory have been at all times available and open to inspection by representatives of the Division of Public Contracts of the United States Department of Labor. In fact they

have on numerous occasions been examined and checked by

428 at least five representatives of such Division. They have not been produced here this morning because of an agree-

ment made between counsel for Endicott Johnson Corporation and counsel for the Division of Public Contracts that no evidence would be taken at this hearing with respect to any of the leather shoe and boot factories, gymnasium shoe factory, or arctic overshoe factory. Representatives of the Corporation have stated to representatives of the Division of Public Contracts, on numerous occasions, that if any violations of the Act of June 30, 1936 (49 Stat. 2036), known as the Walsh-Healey Act, were found in these factories they were without the knowledge or consent of the management of Endicott Johnson Corporation and that any alleged violations which were pointed out by the Division and could not be explained would be promptly adjusted without the necessity of any hearing.

The second class or group of payroll records required to be produced under such subpoenas contains:

- (a) Records of Calfskin Tannery at Endicott, N. Y.
- (b) Records of Upper Leather Tannery at Endicott, N. Y.
- (c) Records of Sole Leather Tannery at Endicott, N. Y.
- (d) Records of rubber mill for the manufacture of rubber and rubber soles and heels, known as Paracord Factory at Johnson City, N. Y.

The pay roll records of the tanneries and rubber mill which I have mentioned have not and will not be produced at this hearing under said subpoenas. Endicott Johnson Corporation, 429 has refused at all times and now refuses to make the pay roll records of said tanneries and rubber mill available for inspection by representatives of the Division of Public Contracts of the United States Department of Labor because it contends:

1. That no person employed by it to manufacture leather in its Calfskin Tannery, Upper Leather Tannery, or Sole Leather Tannery at Endicott, N. Y., or to manufacture rubber, rubber soles and heels in its rubber mill known as Paracord Factory at Johnson City, N. Y., was at any time engaged in the performance of any contract under which it manufactured leather shoes and leather boots in its George F. Tabernacle Factory at Binghamton, N. Y., and in its Scout Factory at Johnson City, N. Y., or under which it manufactured gymnasium shoes in its Jigger Factory at Johnson City, N. Y., or under which it manufactured arctic overshoes in its Sunrise Factory at Johnson City, N. Y.

2. That as a manufacturer of leather in its Calfskin Tannery, Upper Leather Tannery and Sole Leather Tannery at Endicott, N. Y., and as a manufacturer of rubber, rubber soles and heels in its rubber mill known as Paracord Factory at Johnson City, it was not at any time, during the performance of any of the contracts to manufacture leather shoes, leather boots, gymnasium shoes and arctic overshoes, a manufacturer as defined in 430 Regulations 504, Article 101, because,

(a) In the operation of said tanneries and rubber mills it was not engaged in producing on the premises articles of the general character described by the specifications in said footwear contracts and because,

(b) The legislative history of the Act of June 30, 1936 (49 Stat. 2036), known as Walsh-Healey Act, indicates that the Congress intended the provisions of the Act to apply only to the actual manufacture of articles of the general character described by the specifications contained in said contracts (i. e., leather shoes, leather boots, gymnasium shoes, and arctic overshoes) and not to the tanning of leather or the manufacture of rubber or rubber soles and heels.

3. That neither under the Act of June 30, 1936 (49 Stat. 2036), known as Walsh-Healey Act, nor under the stipulations contained in any of its contracts for the manufacture of leather shoes, leather boots, gymnasium shoes, or arctic overshoes, was or is it, as a manufacturer of leather or as a manufacturer of rubber or rubber soles and heels, under any obligation to maintain, keep on 431 file, or make available for inspection any records of employ-

ment or payroll records of its tanneries at Endicott, N. Y., or its rubber mill at Johnson City, N. Y.

4. That the Division of Public Contracts of the United States Department of Labor and the Secretary of Labor were and are without jurisdiction or authority to require it to maintain, keep on file, or make available for inspection records of employment or payroll records of its tanneries at Endicott, N. Y., or its rubber mill at Johnson City, N. Y., either under the Act of June 30, 1936 (49 Stat. 2036), known as Walsh-Healey Act; or under the stipulations contained in any of its contracts for the manufacture of leather shoes, leather boots, gymnasium shoes, or arctic overshoes; or under any Regulation or Ruling of the Secretary of Labor or the Division of Public Contracts of the Department of Labor..

5. That the Ruling of the Administrator of the Division of Public Contracts of the United States Department of Labor that its operations as a manufacturer of leather in its tanneries at Endicott, N. Y., and as a manufacturer of rubber, rubber soles, and heels at Johnson City, N. Y., are subject to the provisions of the Act set forth as stipulations in its contracts to manufacture leather shoes, leather boots, gymnasium shoes, and arctic
482 overshoes in factories and premises miles distant from the place of manufacture of said leather and rubber; rubber soles and heels, is arbitrary, artificial, unreasonable, discriminatory, and capricious.

The third class or group of payroll records required to be produced under such subpoenas contains:

(a) Records of Sole Cutting Departments at Johnson City and Endicott, N. Y.

(b) Records of Counter Department at Johnson City, N. Y.

(c) Records of Carton Department at Johnson City, N. Y.

The payroll records of the Sole Cutting Departments, Counter Department, and Carton Department will not be produced at this hearing under said subpoenas. Endicott Johnson Corporation has refused at all times and now refuses to make the payroll records of said Sole Cutting Departments, Counter Departments, and Carton Department available for inspection by representatives of the Division of Public Contracts of the United States Department of Labor for the same reasons and upon the same grounds and contentions which I have stated with respect to its tanneries and rubber mill.

Q. That is a fairly comprehensive statement and that constitutes all of the reasons why the corporation is not producing here this morning the records mentioned in the subpoenas
483 and in turn identified in the statement that you have just read?

A. That is correct.

Q. I take it that your statement can be accepted at least as a formal tender of all of the records that we have subpoenaed for the footwear factory?

A. That is correct.

Q. The fact that they were not physically produced here this morning is not a refusal?

A. No.

Mr. GRANT. I might say this, Mr. Examiner, that Mr. Swartwood and I did discuss a procedure when I was here the last time in which it was agreed that very little could be gained by proceeding with such violations as we might be able to prove in the footwear factories requiring of course the findings of the Examiner as to those particular factories, the computation and auditing of the amounts due, if evidence was introduced of violations, a claim made upon the company for those amounts, when it might well be that if the court should hold that these other factories and departments that had been mentioned this morning were all so subject, the Government would be duplicating its effort by simply going through the same process. So that as counsel for the Government I conveyed to Mr. Swartwood my intention to proceed against all of the factories and departments

434 at one time. The further fact that the refusal of the company to produce records of the other plants and factories this morning makes it impossible for the Government to proceed under that desirable method of procedure. It is true that we have a partial transcription of records in the tanneries and in the Paracord Factory, which of course is but a partial transcription and shows but a part of the hours and wages earned by the employees who were employed in those factories, so that if we were to proceed with evidence here this morning it could be but fragmentary evidence, that is a fragmentary part of the entire violation, if the failure to pay overtime to employees in the tanneries, rubber mills, etc., is a violation of the Act by reason of the fact that the Court would hold that they are subject to the Act, and those records and books that we have subpoenaed are absolutely necessary and essential to the Government in proceeding with the evidence.

It is true that we could subpoena a number of witnesses, a group from every department, but we can accept it as well nigh impossible that those witnesses could speak for others, and in other words we would have but a small part of the factory or plant represented without the books showing the wages earned and the hours paid and therefore, because those records are absolutely essential and necessary to the intelligent progress of the hearing, I am going to ask, in view of Mr. Swartwood's statement, that the hearing be continued pending an application

435 to the Federal Court asking that the Court issue an order requiring the corporation to produce those books and records which it has refused to produce here this morning.

The WITNESS. Not only continued pending the application for the order, but pending a final decision of some appellate court that the ruling is in accordance with the Act and that the tanneries, rubber mill, and carton, sole cutting and counter departments are subject to the provisions of the Act contained in the shoe contracts.

Mr. GRANT. I think, Mr. Examiner, that the statement that Mr. Swartwood has made, setting forth his refusal is a sufficient, unqualified, and unequivocal refusal. If you have any questions you would like to ask, I would be glad to either propound them myself or wait the pleasure of the Examiner.

The WITNESS. We have some testimony we would like to put in with relation to the record. And if you are through we will just proceed.

Cross-examination by Mr. PRITCHARD:

Q. Coming back to the contracts, Mr. Swartwood, to which you have referred in the testimony, did each one of those contracts denote the specific factory in which the goods were to be produced?

A. Yes, sir. In each of the bids upon which these contracts were awarded, there was a specific paragraph which
436 required the bids to state, under this language: "Names and Locations of Factory—Bids must state in space provided below; names and locations of the factories where manufacture of the item bid upon will be performed. The performance of any of the work contracted for in any place other than that named in the bid is prohibited unless the same is specifically approved in advance by the contracting officer. If more than one place of manufacture is named, the quantity to be manufactured in each place must be given." In the bid, in the paragraph under the heading "Names and Locations of Factories and Quantities in Each of the Shoe Contracts," the George F. Tabernacle Factory, East side of Washington Street, south of the corner of Susquehanna Street, Binghamton, N. Y., was specified for that factory. And with respect to the one contract performed in the Scout Factory, that factory was given as the name and location of the place of manufacture. With respect to the arctic overshoes and gymnasium shoes, nothing was specified except place of manufacture at Johnson City, N. Y., because those were Navy contracts, as I recall.

Q. Mr. Swartwood, prior to your appointment as Secretary of the company, did you serve as Assistant Secretary?

A. Yes, sir.

Q. And during the period that you served as Assistant Secretary and Secretary, did you prepare the bids or have the bids prepared under your direct supervision for these contracts?

437 A. I prepared all of these bids except the first two, which were numbered Exhibits 1 and 2, respectively. Those were prepared by my predecessor, Mr. Morris E. Page, who died in November 1936.

Q. And at the time of the award of those contracts you knew that the particular factories where they would be produced would be subject to the provisions of the Walsh-Healey Act?

A. Yes, sir.

Q. And you also knew that the contracts contained stipulations to the effect that no one would be employed more than eight hours in any one day or forty hours in any one week without payment of time and a half for all overtime worked in excess of those hours?

A. Yes, sir.

Q. Were the people in charge of these various factories also aware of those stipulations?

A. Yes, sir; we posted, in accordance with the stipulations of the contract, copies of these stipulations in the various footwear plants where the shoes were to be made,—full copies of the Walsh-Healey Act stipulations.

Q. Was any minimum wage ever established by the Secretary of Labor for the shoe industry?

A. Yes, sir.

Q. Will you state, if you can, when that minimum wage was established, and to what portion of the industry it applied?

438 A. It became effective January 5, 1938 and the Secretary of Labor promulgated a minimum wage of 40¢ per hour or \$16.00 per week for a work week of forty hours for the men's welt shoe industry only.

Mr. PRITCHARD. I have here a copy of the order of the Secretary of Labor which I would like to introduce in evidence as our Exhibit No. 1, if you have no objection.

Mr. GRANT. No objection.

(The paper hereinabove referred to and described was received in evidence and marked "Respondent's Exhibit No. 1.")

[This exhibit is the same as Defendants' Exhibit B in the District Court proceeding.]

By Mr. PRITCHARD:

Q. Mr. Swartwood, will you state what welt shoe contracts were awarded to Endicott Johnson subject to the establishment of this minimum wage?

A. Only the contracts mentioned as Government Exhibit No. 12, which is Contract No. W-155-QM-8232, dated March 24, 1938,

for "Boots, leather, laced, Special Type 'J' for mounted enlisted men" to be made in the George F. Tabernacle Factory at Binghamton, New York; the contract Government Exhibit No. 13, Contract No. W-155-QM-CIV-96, dated May 16, 1938 for shoes, "Service, Special Type 'B'" and shoes "Service, Special Type 'E,'" to be made in the George F. Tabernacle Factory at Binghamton, New York; and contract Government Exhibit No. 15, 439 Contract No. W-155-QM-CIV-125, dated June 6, 1938 for shoes, "Service, Special Type 'B' 3" and shoes "Service, Special Type 'E'" to be made in the George F. Tabernacle Factory at Binghamton, New York.

Q. So those contracts you have just referred to are the only ones of the contracts involved in this controversy which would be subject to the provisions of that order?

A. Yes.

Mr. GRANT. And I might state, Mr. Examiner, that those are the only three contracts in which the Government contends that they were subject to a minimum wage requirement.

By Mr. PRITCHARD:

Q. Mr. Swartwood, were the pay roll records of the Endicott Johnson Corporation ever checked by any representative of the Division of Public Contracts of the Department of Labor, during the period from October 1936, when the first contract was awarded, to June or July of 1938, for possible violations of this Act?

A. Yes, sir.

Q. Will you state how many representatives checked your records during that period?

A. Three representatives of the Division of Public Contracts checked the records of the footwear factories prior to July 1938, and during the performance of the various contracts which we have mentioned this morning. They were a Mr. Hill, Mr. Madison Smith, and a Mr. Roller.

440 Q. Is it true, Mr. Swartwood, that most of these contracts involved here had been fully performed by July 1938?

A. Yes; all but the last two contracts for welt shoes, that is Government Exhibit No. 13, Contract No. W-155-QM-CIV-96, which was completed October 11, 1938, and Government Exhibit No. 15, for leather welt shoes, Contract No. W-155-QM-CIV-125, which was completed October 11, 1938. There was also the small contract for the arctic overshoes, Government Exhibit No. 14, Contract No. W-155-QM-CIV-118, which was not completed until August 30, 1938.

Q. Now on the occasions that these records were checked, what particular records were checked at those times?

A. Just the records of the footwear factories.

Q. Did any one of the representatives of the Division of Public Contracts who inspected the records on those occasions ever raise any question that the company was not complying with the provisions of the Walsh-Healey Act?

A. They never did.

Q. Were all of the records requested by the inspectors on those occasions made available to them by the company?

A. Yes, sir.

Q. And as far as you knew or the company knew, no question was ever raised at that time that we were violating the provisions of the Walsh-Healey Act?

A. No, sir.

441 Q. And as far as you knew or the company knew we were fully complying with the provisions of that Act?

A. Yes, sir; as far as the inspectors told us.

Q. At the times those records were checked, was any request or demand ever made for the pay roll records of either the Endicott Johnson Corporation's tanneries or of its rubber mills?

A. No, sir.

Q. Mr. Swartwood, as counsel for the company, had it ever occurred to you or had it ever occurred to anyone in charge of the Endicott Johnson Corporation that the company's tanneries or rubber mills might be subject to the provisions of this Act?

A. No, sir.

Q. Did you have any information at hand which led you to believe that these departments were not subject to the Act?

A. Yes, sir.

Q. Will you state what that is, Mr. Swartwood?

A. Well, we are subscribers to the Prentiss-Hall Labor Service, and there was a decision noted in the Prentiss-Hall Service, issued by the Acting Administrator of the Division of Public Contracts, in the case of the International Harvester Company, which indicated that the manufacture of steel and magnetoes in plants

442 other than the plants in which the Harvester Company manufactured trucks for the United States Government were not covered by the stipulations of the Walsh-Healey Act contained in the truck contracts.

Q. That ruling was to the effect that the provisions of the Act would apply only to the truck factories of the International Harvester Company, which were making the articles which the company was contracting to furnish?

A. Yes, sir.

Mr. PRITCHARD. Mr. Examiner and Counsel, I have here a photostatic copy of the letter written by the Acting Administrator at that time to the General Counsel of the International Harvester Company concerning this ruling. Have you any objections if I

introduce this? The underlined portions are the pertinent sections.

Mr. GRANT. This, Mr. Examiner, appears to be Circular Letter No. 200 distributed by the Assistant Director of Procurement Division of the Treasury Department, wherein he sets forth and quotes verbatim the letter of Mr. Gerard D. Reilly, the then Acting Administrator of the Public Contracts Division, dated January 5, 1937. I have no objection to its introduction.

Mr. PRITCHARD. We offer this in evidence as Respondent's Exhibit No. 2.

(The paper hereinabove referred to and described was thereupon received in evidence and marked "Respondent's Exhibit No. 2.")

[This exhibit is the same as Defendants' Exhibit A for Identification in the District Court proceedings.]

443 Mr. GRANT. Mr. Swartwood, right here may I ask did that letter or digest of that letter appear in Prentiss-Pall?

The WITNESS. Yes, sir.

Mr. GRANT. Could you give me the citation?

The WITNESS. Yes; it is Paragraph 13.075.2 headed "Application of Act only to plant or plants engaged on contract."

By Mr. PRITCHARD:

Q. So, Mr. Swartwood, in addition to the various reasons outlined in your opening statement for our refusal to produce the records of our tanneries and rubber mills, the ruling in this particular instance was also a further ground for your not producing those records?

A. Yes, sir.

Q. Can you state when was the first time that you were called upon to produce any records relative to the tanneries and rubber mills?

A. Yes, sir; some time in the latter part of June or the first part of July 1938, I was called upon by a Mrs. Mary P. Hogue.

Q. Will you explain who Mrs. Mary P. Hogue is?

A. She was a representative of the Division of Public Contracts and called upon me at my office in Endicott City, in the latter part of June or the first part of July 1938.

Q. At the time she made this request for the records of those departments, what did you tell her?

444 A. I told her that it was our contention that the operations in the tanneries and rubber mills were not covered by the stipulations of the Walsh-Healey Act, which were contained in our contracts, to manufacture leather shoes, gymnasium shoes, and arctic overshoes.

Q. Can you state the next time this matter was brought to your attention?

A. Yes, sir.

Q. When was that?

A. Some time prior to February 23, 1939, I was informed by our paymaster that a Mr. Stevenson, who was assisting Mrs. Hogue in the examination of our footwear factory records, had requested that he be permitted to take certain of our employment records relating to the tanneries and rubber mills to Washington for transcription.

Q. And what did you do then? What did you say to Mr. Stevenson?

A. I told Mr. Turner to have him come to the office of Mr. Charles F. Johnson, Jr., the General Manager, which he did immediately, and I then told Mr. Stevenson of my first conversation with Mrs. Hogue in the latter part of June or the first part of July 1938, and that the company took the position that the tanneries and rubber mills were not subject to the stipulations of the Act contained in the contracts to manufacture footwear
445 and that we would not permit the examination of those tanneries and rubber mill records either in Washington or anywhere else. Mr. Stevenson stated that he would go back to Washington and discuss the matter with Mr. L. Metcalfe Walling, the Administrator of the Public Contracts Division, and tell him what our position was.

Q. And subsequent to that time, Mr. Swartwood, did you receive a communication from Mr. Walling of the Public Contracts Division?

A. The company received a letter written by Mr. Walling dated February 23, 1939, that was addressed to Mr. Charles F. Johnson, Jr., and this letter stated that the processing of the leather and rubber for shoes supplied under the Government contracts was subject to the provisions of the Act and that the records of our tanneries and rubber mills were subject to inspection by representatives of his division.

Mr. PRITCHARD: Mr. Examiner and Counsel, I have here a photo-static copy of that letter from Mr. Walling, which I would like to introduce as our Exhibit No. 3.

(Letter above referred to and described was thereupon received in evidence and marked "Respondent's Exhibit No. 3.")

[This exhibit is the same as Plaintiff's Exhibit 6 in the District Court proceeding.]

By Mr. PRITCHARD:

Q. After the receipt of this ruling from Mr. Walling, what did you do then, Mr. Swartwood?

446 A. I made an appointment to see Mr. Walling in Washington on March 1, 1939.

Q. Can you tell us the general contents of the conversation you had with him at that time?

A. Yes, sir.

447 **EXAMINER McILWAINE.** Mr. Swartwood, I am going to give the Government the right, of course, to contradict any interpretation of this conversation down in Washington that you have made.

The WITNESS. They should have it.

EXAMINER McILWAINE. As a matter of fact, as the Examiner in this case, as far as my report is concerned, it doesn't strike me as making any different what interpretation you may have made of that conversation and I will even go further than that and say I don't care what that conversation was because my recollection of the law on that point is that an officer of the United States Government would have no right to waive the statute of limitations in any case. Therefore, I am not bound by the conversation down there or the interpretation which you may have incorrectly or correctly put on that conversation.

The WITNESS. The purpose of offering the testimony, Mr. Examiner, is to give you the background and also the Federal Court, when an application is made, the background of this proceeding and we feel that it is competent to introduce it at this time to show that if the Administrator had the power to make the regulation which would put them under the law that he might also have discovered that he made a mistake.

EXAMINER McILWAINE. On the other hand, Mr. Swartwood, if Congress enacts a statute and certain persons are designated to carry out that Act, every act that they do and every regulation that they make which carries out the intention of Congress is all well and good, but if they make some ruling or interpretation which does not carry out the intention of Congress, I don't consider that I am bound by that. That is the reason I am stating right here my reaction to all this testimony you are putting in now.

MR. GRANT. May I say this, Mr. Examiner, that I am confident of the fact that an agent or officer of the United States Government cannot bind the Government as to the Government's rights or preclude the Government from any rights it may have under an act enacted by the Congress of the United States. What I
449 think Mr. Swartwood is doing here is more in the nature of raising of the equities of the situation. As I said, and to that extent, I want to reserve, as you have permitted me to do, the right to contradict the interpretation of any conversation.

EXAMINER McILWAINE. I will give you the right to contradict such conversations at the proper time.

THE WITNESS. It is also understood, Mr. Examiner, by Mr. Grant and I that if the Administrator made a mistake in his interpretation as to the application of this law that it has no effect on us and we have a right to contest it.

EXAMINER McILWAINE. I think you have a right to contest the rulings and regulations under the Act as far as you may believe that a certain ruling or regulation is not carrying out the intention of the Act.

MR. GRANT. There is no question about it that those charged with enforcement or administration of the Act cannot do anything which the Act doesn't involve.

THE WITNESS. Our principal purpose is to show that this company never had any intention of violating this Act, that it issued instructions and tried to the best of its ability to comply with the Act in the factories which it considered were covered, and as to the tanneries and rubber mills it never believed they were covered and never made any attempt to comply with the Act in those places. The reason for it is what I am trying to get on the record now.

450 **EXAMINER McILWAINE.** If the Government was mistaken and certain other integral parts of that establishment were covered by that Act, no matter what you may have said to Mr. Walling or Mr. Grogan or what they may have said to you, I am not bound by that.

THE WITNESS. No, sir; but it certainly shows the good faith in which we acted.

EXAMINER McILWAINE. And to that extent I have no objection, with the reservation which I have already noted.

MR. PRITCHARD. That is our chief purpose in introducing this testimony, to show our good faith.

By Mr. PRITCHARD:

Q. Shortly after this hearing on March 1st, which you had with Mr. Walling in Washington, did you file a brief substantiating the position you had taken?

A. Yes, sir. On April 18, 1939, I filed a brief with Mr. Grogan setting forth our position and contentions and the operations of the production of leather and the making of rubber, rubber soles and heels, and it was sent to him in Washington. It was attached to the moving papers on our original affidavit to make more definite and certain the photostatic copy of that brief.

• • •

453

By Mr. PRITCHARD:

454

Q. After that meeting of April 20th, to which you have just referred, Mr. Swartwood, what happened then?

A. We never heard anything further from the Department until July 15, 1939 when we received a letter from Mr. Walling referring to his letter of February 23, 1939, and stating that it would be necessary for a representative of his office to inspect the records of our tanneries and rubber departments and to complete the inspection and transcription of such records which had been only partially completed.

Q. The letter stated that some of the records then of the tanneries and rubber mills had been partially completed?

A. That's right and that is the first time we ever knew they had ever had access to them.

Mr. PRITCHARD. I would like to introduce, as Respondent's Exhibit No. 4, a photostatic copy of the letter of July 15, 1939, from Mr. Walling to Mr. Johnson.

(Letter above referred to was received in evidence and marked "Respondent's Exhibit No. 4.")

[This exhibit is the same as Plaintiff's Exhibit 9 in the District Court proceeding.]

By Mr. PRITCHARD:

Q. After receipt of this letter of July 15th of Mr. Walling, did you have any further conference with the Division of Public Contracts?

A. Yes, sir.

Q. And when was that?

A. On July 31, 1939, Mr. Johnson and I again had an interview with Mr. Walling and Mr. Grogan.

455 Q. Mr. Swartwood, when did the question of the application of the Walsh-Healey Act to our sole-cutting and counter department first arise?

A. Mr. Grant came up to look over the operations in the tanneries and rubber mills on August 14th and at that time he brought Mr. Stevenson with him to examine the records, if we turned them over, but we continued to assert our previous contentions and Mr. Grant went back to Washington and left Mr. Stevenson in Endicott, and during the month of August 1939

456 I had several telephone conversations with Mr. Grogan asking whether we were going to turn these records over, etc., and finally, on August 30th, Mr. Grogan asked me whether I thought that the operations in sole-cutting and counter-making and carton departments, and I think at that time he mentioned the lining department, were covered by the stipulations of the Act. I told him that speaking as a lawyer and not as a shoe manufacturer I would say that they were probably part of the shoe manu-

facturing operation, but I would check on that with Mr. Johnson and I did check with Mr. Johnson on that afternoon and the next day when I talked with Mr. Grogan, I told him that I found these operations were, with respect to sole-cutting and counter-making and carton manufacturing, in the same category that the rubber mills and tanneries were, because the customary practice of practically every shoe manufacturer in the industry was to purchase their soles already cut and sorted as to sizes and quality and to purchase their counters from outside counter manufacturers and to purchase their cartons in the same way.

Mr. GRANT. Now, Mr. Swartwood, may I say right here, are you speaking now from your capacity as an attorney for the company or do you know that a shoe company does not ordinarily cut its own outer soles, middle soles, and inner soles and manufacture its own counters and cartons?

457 The WITNESS. Yes, sir; that is from information which I derived from Mr. Charles F. Johnson, the General Manager. In my statement to Mr. Grogan I said that was my interpretation as a lawyer and after he questioned me I checked with Mr. Johnson and I now found that the general practice in the shoe industry is to buy the cut soles and cartons on the outside. There are practically no manufacturers in the world that have as extensive operations as Endicott Johnson in the shoe industry.

Mr. GRANT. And that, however, is on the basis of the authority of Mr. Johnson?

The WITNESS. That is correct; yes, sir.

(Ten minute recess.)

Mr. PRITCHARD. Mr. Grant, I would like to ask if all the pleadings in this matter are of record—the amended complaint and our original affidavit, the motion and the answer of course? We thought we might produce all these in the testimony for a matter of record.

Mr. GRANT. The formal record of any hearing of ours consists of the formal pleadings, the transcript of the testimony and the exhibits.

The WITNESS. Will the record now contain our affidavit and notices of motion?

Mr. GRANT. Oh, yes. The record as it is so far contains the original complaint, your motion, an affidavit attached thereto in support of a more specific complaint, the amended
458 complaint, your answer and your motion for a more specific complaint and the two subpoenas. That is the record of the formal pleadings or docket that is similar to a court docket and that is of record to the court without their formal introduction into the record.

By Mr. PRITCHARD:

Q. Referring again to your opening statement, you stated that the ruling of the Administrator of the Division of Public Contracts in holding that the tanneries and rubber mills were subject to the stipulations of the Act was arbitrary, capricious, and discriminatory. Will you elaborate more on that statement?

A. On the question of the unreasonableness of it and its being unfair and discriminatory and arbitrary, I would like to call the Examiner's attention to the fact that during the period from October 26, 1936, when we commenced work under our first contract, up to October 11, 1938, when the last contract was completed, only .162% of the upper leather produced by Endicott Johnson Corporation in its upper leather tanneries was used on Government contracts; that only .142% of the upper leather produced in its calfskin tannery was used on Government contracts; that only .049% of the sole leather produced in the sole leather tannery was used on Government contracts; and only .034% of the rubber soles and heels produced in the rubber
450 plant was used on Government contracts. In other words, from 84% to 97% of our production in the tannery and rubber mill operations was for commercial purposes. Now it is our contention that any regulation or interpretation which would require us to manufacture from 84% to 97% of our leather, rubber soles and heels, under the provisions of the Walsh-Healey Act, because from 3% to 16% of our production of such leather, rubber soles and heels was to be used in Government shoes, would be held by the courts to be arbitrary, unreasonable and unfair and discriminatory. As a matter of fact it is impossible to separate the employees who produce leather and rubber soles and heels to be used in Government shoes from those who produce leather, rubber soles and heels to be used for commercial purposes, first, because the leather which is used for leather soles on Government shoes is not selected until the cut soles have been sorted and graded as to defects and sizes, and in fact it is not finally selected until the Government inspectors pass on it at the footwear factory, where it is going to go into the shoes. Second, because the hides which were used for upper leather in Government shoes cannot be determined or selected until approximately two-thirds of the tanning process has been completed; and third, because the rubber heels and soles for the Government shoes are not selected until they have been sorted and graded as to defects and
460 sizes, and that therefore any regulation that would require separate pay roll records to be kept for employees engaged in Government work as to these processes would be impossible of performance, and further, that the regulation

which requires the payment of time and a half for overtime to an employee who works any portion of a day or week on Government contracts and the remainder on commercial work, even though all the actual overtime is devoted to commercial work, should not apply to this situation, and if it is attempted to be applied, it is our opinion, on the basis of our contention, that the courts would not hold it enforceable because it is arbitrary and unreasonable.

Q. As far as you know, Mr. Swartwood, would the conditions which you have just described with respect to the tanneries and rubber mills also be applicable to the other departments such as the cut sole department, etc.?

A. Yes, sir. It is my understanding that in the production of the cut soles, as I have stated, there is no selection made until the sole actually arrive at the factory in which the shoes are being made and then they are accepted or rejected on the approval of the Government inspectors who are present at the shoe factory in which the shoes are actually made. It is also my understanding that the reason for inserting the place of manufacture in the bid is to indicate to the Government where the material may be selected. The same thing holds true with respect to the counters and to the cartons.

Furthermore, on the question of the unreasonableness of
461 this rule and regulation, you have a situation here where we purchased all of the welt material that went into these shoes and we purchased some of the soles. As to those there is no application of this Act, because the subcontractor under the regulation is not subject to the stipulations of the Walsh-Healey Act. It seems unfair and unreasonable to take part of it, when we purchased those and compel us to manufacture the rest of it under the provisions of the Act.

As I have already stated, in response to Mr. Grant's question, it is my understanding, from statements made by Mr. Charles F. Johnson, that the shoe manufacturer customarily and usually purchases his leather soles, including the middle soles, outer soles, and inner soles, from an outside manufacturer, that these are cut and sorted as to sizes and quality, and it is also my understanding that it is customary in the shoe industry to purchase counters and cartons in the same way from outside manufacturers.

Q. Now, one further question, Mr. Swartwood. To your knowledge, has any distinction ever been made between so-called boot and shoe industry and the rubber industry and the tanning industry?

A. Yes, sir.

Q. Can you state what distinctions have been made with respect to those industries?

462 A. Yes, sir. Back in the days of the National Industrial Recovery Act, there were separate and distinct codes for the boot and shoe manufacturing industry and for the rubber manufacturing industry, and for the leather manufacturing industry. Under the boot and shoe manufacturing code the boot and shoe industry was described as "comprising the manufacture of boots, shoes, sandals, slippers, moccasins, leggins, overgaiters, and allied footwear, chiefly of leather, and also footwear of canvas and other textile fabrics." That is taken from Article I of the Boot and Shoe Manufacturing Industry Code, approved by the President October 3, 1933.

Under the same Act, the leather industry adopted a code of fair competition and they have a long description, but the principal elements of the industry are these: "The term 'leather industry' shall be held to comprise all persons engaged in tanning or finishing leather for further fabrication or for sale, for their own account or for the account of others, or performing any operation subsidiary thereto, or having leather tanned or finished in American factories or engaged in the sale of American tanned or finished leather for their own account or for the account of others, and persons approved by the National Recovery Administration engaged in the cutting or further partial fabrication of leather." Then they describe various divisions and one of which is the sole and belting division, which includes: "Tanners of leather made

463 from cattle hides for the manufacture of shoes and industrial belting, and upper leather, east and west, tanners of leather including japanners (finishers) largely made from cattle hides in kits (small cattle hides) suitable for the manufacture of shoes." And another division, cut soles, tanners and/or cutters and producers of leather soles used in the manufacture of shoes.

Now the rubber industry, under the National Industrial Recovery Act, also had a code and they defined, in Section 1, the term "rubber manufacturing industry, or industry used herein means the manufacture for sale in continental United States, including Alaska, of all rubber products or products expressly excluding however all solid and pneumatic tires and pneumatic tubes and tire accessories and/or tire repair materials together with such other rubber products as may be specifically covered by another duly approved code of fair competition" and in Section 2 they set up various divisions of the industry, one of which was the Heel and Sole Division. That definition is found in Article I, Sections 1 and 2 of the Code of Fair Competition of the Rubber Manufacturing Industry approved by the President, December 15, 1933.

In addition to that the Bureau of Census of the Department of Commerce has defined the leather industry, first in the Census of Manufactures of 1935, as Industry No. 907—"leather, tanned,

curried, and finished, tanneries manufacturing leather, whether from hides or skins owned by them or on a
 464 contract basis from hides and skins owned by others, and establishments engaged in currying and finishing leather." They also define the leather industry in the Census of Manufactures of 1937 as "Industry No. 907—leather, tanned, curried, and finished, regular factories, tanneries manufacturing leather from hides and skins owned by them and establishments engaged in currying and finishing leather." And Industry No. 927—"leather tanned, curried, and finished, contract factories, tanneries manufacturing leather on a contract basis from hides and skins owned by others and establishments engaged in currying and finishing leather owned by others."

It is also our contention that the Secretary of Labor, in establishing the minimum wage definitely limited the application of the Walsh-Healey Act with respect to the manufacture of shoes, to the manufacture or supply of men's welt shoes, and, as we understand it, the Department conceded that the minimum wage does not apply to the operations of the tanneries or rubber mills.

Mr. PRITCHARD. I have no further questions, Mr. Examiner, except to formally move at this time for the relief which we have asked for in the notice of motion for and the answer, which I assume you won't pass upon today.

Examiner McILWAIN. I will reserve my ruling on that. I haven't seen that, and I will reserve my ruling.

465 Mr. GRANT. I wanted to ask just a few questions, Mr. Examiner.

By Mr. GRANT:

Q. Mr. Swartwood, at this hearing before the National Labor Relations Board on October 23rd, you were asked a question by Mr. John C. Bruton, who was of counsel for the company, a very pertinent question to this proceeding here, in which [I will read you the question] he says: "Switching to another subject, particularly that of the functional integration of the various plants and properties of this corporation, is it your judgment that this business carried on in Binghamton, Johnson City, Endicott, and Owego, is one integrated business?" Your answer was, which is not entirely clear, and it may be that it was the fault of the reporter: "Yes, it is an industrial, as far as my judgment can determine."

A. The word "unit" is left out. It means industrial unit for collective bargaining.

Q. In other words you considered it as an integrated business for the purpose of collective bargaining?

A. Only for the purpose of the Wagner Act and for the purpose of designating an appropriate unit under which an election could

be held to determine who the bargaining agent should be for that appropriate unit.

Q. Your contention then, of course, is that there should be one bargaining agent for the entire business?

466 A. Including the tanneries, rubber mills and shoe industry and it was so agreed by the unions, that is the production workers in that union, for the purpose of the election.

Q. So that your answer was "Yes, it is an industrial unit as far as my judgment is concerned."?

A. Yes; relating only to a bargaining unit under the National Labor Relations Act.

Q. Mr. Swartwood, do you know anything of the custom of the inspectors of the Quartermaster Depot, in what plants or factories they make inspections for, let us say, a contract for leather shoes?

A. Yes, sir.

Q. Do they go into your tanneries?

A. No, sir.

Q. I believe your testimony was that there is no possible way of segregating the hides that go into commercial and Government contracts respectively until it is about two-thirds completed?

A. That is correct.

Q. At what point is that operation, do you know?

A. As I have had it explained to me, it is the fat licker, but I have no personal knowledge that it is the step known as the fat licker. I am not familiar with it. They explained to me
467 that it is only after about two-thirds of the operation had been completed before they could determine whether these hides were of satisfactory quality to continue the process with respect to the Government contract.

Q. At that point I believe these hides are labeled with a Government label or stamp?

A. That I could not say. It was my understanding that there was no label on them whatever.

Q. But I was wondering whether the Government stamp or brand was put on?

A. I couldn't answer that.

Q. Do I understand from your testimony, Mr. Swartwood, that the Quartermaster Depot has only inspectors in the footwear factory that inspect the cut soles that come into that factory, or do they inspect them prior to their entry into the footwear factory?

A. My information is that the customary procedure in Government inspection in the average shoe factory is to make the entire inspection of the cut soles and the heels and counters and of the shoes as they are completed at the factory in which they are

actually manufactured. It is also my understanding that with respect to the Endicott Johnson Corporation, the Government inspectors on the performance of each of these contracts inspected the cut soles at the point where they were cut before they
468 were shipped to the factory. I assume that it is also true with respect to the inner soles.

Q. And do you know whether or not they would inspect the rubber heels and soles as they were produced or came out of the Paracord Factory?

A. My understanding of it is that they were inspected at the factory. They are made according to a mold and the only thing I could see that they would need to be inspected for was a break or something on the side of the heel or some defect in it at the factory.

Q. But as far as your judgment goes you think that they do inspect those in the Paracord Factory?

A. No; I think they inspect the rubber soles and heels in the factory in which the shoes are made, but the soles are inspected, as I understand it, in the departments in which they are actually cut.

Q. And that same thing applies to the counters, that is they are inspected in the counter department?

A. That is my understanding, yes.

Q. Has the company any facilities for manufacturing—is it welting or welts?

A. It is welting material made into welts.

Q. Does the company have any facilities for this at all?

A. No, sir.

Q. I notice in your answer that you don't produce them at all?

469 A. We buy them from the Walter L. Johnson Company, at Endicott.

Q. Is that an independent corporation?

A. Yes; it has no connection with us whatever. It is operated by Mr. Walter L. Johnson and Mr. Leighton Condon, and has no relation whatever with the Endicott Johnson Corporation.

Mr. GRANT. Mr. Examiner, I just want to note for the record here that I didn't mean to imply that should the ultimate decision of the Court deny us the records to the tanneries or rubber mills that we are in any wise waiving any claims that we might have or that the evidence might show, as against the footwear factories. They will be dealt with should the Court take that action.

Mr. Examiner, as far as I am concerned, that concludes the hearing this morning. As I said, I ask that the hearing be continued, not closed, but continued pending the application to the Court and a decision of the Court granting or denying us the

right to the records that Mr. Swartwood has refused to produce this morning.

Examiner McILWAINE. If there is nothing further, we will continue the hearing until such time as a decision is handed down by the Court.

(Whereupon, at 12:45 o'clock P. M. the hearing in the above-entitled matter was continued, pending the decision of the Court.)

470

Plaintiff's Exhibit 14 for Identification

(Certified copy of report of Mary P. Hogue, investigator of the Division of Public Contracts, Department of Labor, to the Division and received by it on November 28, 1938.)

NOTE.—According to Mr. Ralph Clark, General Superintendent of the Tanneries, after leather comes out of the Blue Department it is sorted and ready for government contract stamp.

In the tannery they make up leather for number of pairs of shoes sold or leather needed, as needed. There is no identification of government contract leather by number of contract. Government contracts have been running in succession and sometimes there has been a split in production when filling two contracts that have overlapped. The same specifications for this contract leather as for other leather. Each of the men interviewed stated that the cream of the leather went into the government orders as it went through the plant.

On November 15, 1938, a conference was held between Mr. J. F. Neiley, Purchasing Agent of Raw Materials, Mr. Ralph Clark, General Superintendent of Tanneries, and the above information was given by these gentlemen. Mr. Clark stated that the government contracts had been following each other in rapid succession during the years 1937 and 1938 in the tannery.

On November 17, 1938, I went through first the Calf skin tannery accompanied with Mr. Schenck, Superintendent of that Tannery. He stated that the best of the hides were taken from their production during 1937 and 1938 for the government contracts. On the afternoon of the same day I went through the Upper Leather Tannery accompanied by Mr. Dennis, Superintendent of this Tannery. Mr. Dennis said practically the same thing regarding the government hides which were sent to the shoe plants to be made into the contract shoes. He said they had a dearth of good leather for commercial use while they were filling the government contracts as the best leather went into the contract hides. These hides are stamped with the contract No. when they are in the sorting department just after the hides are blued.

Plaintiff's Exhibit 15 for Identification

(Certified copy of letter on file in the Division of Public Contracts, Department of Labor.)

DEPARTMENT OF LABOR

DIVISION OF PUBLIC CONTRACTS

WASHINGTON

FEBRUARY 16, 1939.

Re Endicott Johnson Corporation,
Binghamton, N. Y.

Mr. RALPH J. FOGG,

*Chief, Investigations Section, Public Contracts Division,
Department of Labor, Washington, D. C.*

DEAR MR. FOGG: In a conference with Mr. H. A. Swartwood and Mr. Charles Johnson, officers of the Endicott Johnson Corporation, relative to releasing the pay-roll records to the Division for computation purposes (Pay-roll records for the years 1936 and 1937) we were advised by them as follows: That it was their understanding that the Tanneries and Rubber Plant were not within the scope of the Act.

Mr. Johnson gives his reason as follows: He claims that his competitors who manufacture shoes to fill government contracts do not own or operate any tanneries or rubber plant and are obliged to purchase all leather and rubber commodities from outside sources; and that, if these outside sources whether a regular tanner or dealer or other source of supply who deliver these commodities to their competitors, who are also the primary contractor, said commodities being used by them in the manufacture of the shoes are not subject to the provisions of the Act he cannot understand why their tanneries and rubber plants would be within the scope of the Act.

He further stated that it was possible to lift the leather used in the manufacture of the soles and heels of these shoes from stock. He stated however he had no records for verification of this statement, and that in all probability a large portion of the leather was processed and used in the manufacture of the shoes during the lifetime of the contracts. He also stated that the leather used in the upper part of the shoes required a special treatment and could not have possibly been treated or processed prior to the time they received these awards.

Mr. Johnson further stated, that it was possible to lift from stock the rubber heels and soles that had been processed in the

rubber plants from stock, and used in filling the contracts. However, he had no records which would substantiate this statement. He said it was possible they had been processed as needed.

In citing the case of his own company and that of his competitors Mr. Johnson frequently contradicted his statements in regard to stock materials. By stating first that it was possible to lift it from stock, then again stating it was not possible to take these materials from stock, due to special processing treatment required under the contract.

He admitted that no separate records had been kept and no effort made to segregate employees engaged on government orders, due to the fact they did not think the Tanneries or Rubber Plant were within the scope of the Act.

Both Mr. Swartwood and Mr. Johnson agreed that after they had conferred with the Division and received a Ruling from them that would determine the status of the Rubber Plant and Tanneries they would then release the records for the year of 1936 and year of 1937 to the Division. We are continuing on the transcription of all records for the year of 1938 covered by the contracts.

It is the opinion of the writers that the processing of this leather or the manufacture of this leather is similar to the manufacture of steel in the steel industry inasmuch as a certain portion will be definitely ear marked for the government contracts and it is impossible to determine until the process has been practically completed just what part of the hides or part of the steel will be used, or identify any particular employee as working exclusively on government material.

It is also the opinion of the writers that the clothing industry where cloth is made by the contractor and then cut into garments is a similar instance. In one consideration it is cloth and in one it is leather, but in each instance it represents a full process mill.

The records disclose that employees engaged in the Tanneries and Rubber Plant have consistently worked in excess of forty hours and were not paid in accordance with the provisions of the Act. A ruling covering the above mentioned plants will be greatly appreciated by the writers.

No effort has been made to secure statements due to the fact we wished to become familiar with pay-rolls covering all plants or factories involved, as this information is necessary before you can intelligently interview an employee.

Within the next few days the transcription of the 1938 pay-rolls for the Calf Skin, Upper Leather and Sole Leather Departments together with names and addresses of those involved will

be sent in for computation. We are now engaged in making transcription of the payrolls of the Rubber Plant.

Very truly yours,

(S) W. E. STEVENSON.
W. E. Stevenson.
(S) MARY P. HOGUE.
M. P. Hogue.

MPH.
WES.

473 *Plaintiff's Exhibit 16 for Identification*

(Certified copy of letter on file in the Division of Public Contracts, Department of Labor.)

DEPARTMENT OF LABOR

DIVISION OF PUBLIC CONTRACTS

WASHINGTON

March 4, 1939.

Re Endicott Johnson Corporation

Binghamton, N. Y.

Mr. RALPH J. FOGG,

*Chief Investigations Section, Division of Public Contracts,
Department of Labor, Washington, D. C.*

DEAR MR. FOGG: We are today transmitting to you the Paracord Factory transcription for the year of 1938. This covers rubber heels and rubber soles for Register Numbers 4780, 7714, and 8099. We deleted three weeks during this year during which no contract was in process of manufacture. It also covers Register 6951 for Gymnasium shoes, and Register 7988 for overshoes (Arctics).

The material for the gymnasium shoes and overshoes is fabricated in the rubber plant, a subdivision of the Paracord Factory. The material is then transferred to the Jigger Plant and Sunrise Factories where the gymnasium shoes and overshoes are manufactured respectively.

Rubber heels and soles for all leather army shoes are completed in the rubber plant, and then transferred to the Geo. F. Factory where the Army Shoes are manufactured.

We are also today transmitting to you a brief transcription for the Sunrise and the Jigger Factories. This represents what over-

time showed for the year of 1938 in these two plants for the time covered in the manufacture for the government of the above mentioned gymnasium and overshoes.

You will note that the Paracord Factory has a duplication of numbers. This is due to the fact that when an employee changes departments he is assigned another number. Both numbers appear on the list of addresses which is included in the report.

Very truly yours,

W. E. STEVENSON.

(S) W. E. Stevenson.

MARY P. HOGUE.

(S) Mary P. Hogue.

Enclosures.

474 *Defendants' Exhibit A for Identification*

Treasury Department.
Procurement Division.

JANUARY 5, 1937.

BRANCH OF SUPPLY

Circular Letter No. 200.

To the Heads of All Departments and Establishments:

Subject: Ruling with respect to the application of the Walsh-Healey Public Contracts Act (Public, No. 846, 74th Congress) to certain phases of the Automotive Industry

Following is copy of letter received from the Acting Administrator of the Public Contracts Act:

"DECEMBER 30, 1936.

"MR. WILLIAM S. ELLIOTT,

"Vice President and General Counsel,

International Harvester Company, Inc.,

606 South Michigan Avenue, Chicago, Illinois.

"DEAR MR. ELLIOTT: Pursuant to our conference yesterday and your subsequent letter the Department has considered a number of questions raised by the International Harvester Company with respect to the application of the Walsh-Healey Act (Act of June 30, 1936, Public, No. 846, 74th Congress).

"While the Department appreciates that under the codes of fair competition the factories of your company were permitted a tolerance in the forty hour week provision so as to permit averaging of time, it does not seem possible under Public Act No. 846 to grant

such a device. The act is quite explicit in requiring that in manufacturing operations performed on a government contract falling within the Act, no employees be permitted to work more than eight hours in any one day or forty hours in any one week without receiving time and one-half for the hours worked in excess of those limits.

"The questions which you have submitted to me relate specifically to the scope of the act in contracts for motor trucks. I understand that your company operates two motor trucks plants and also separate factories in which farm implements, magnetos for tractors and steel and other materials are manufactured.

"Your first question is whether the company would be complying with the stipulations required by the act if it adapted its operations in the truck factories to these standards, or whether they also apply to the other mills owned and managed by the company. Inasmuch as Congress limited the scope of the act to manufacture of the articles required under the government contract, your company would be complying with the act on truck contracts if the truck factories were operated in conformity with the law.

475 "Your second question relates to the employment of foremen. It is understood that these foremen are salaried employees and are not manually engaged in productive operation under the contract. In a recent opinion rendered to the Public Contracts Board in connection with textile manufacturing the Solicitor of Labor ruled that foremen in this category do not come within the act. It follows that this ruling is equally applicable in this instance.

"Your third question notes that custodial and maintenance employees are not covered by the act and regulations and you ask for a more precise list of employees falling into this category. Employees in this class include watchmen, timekeepers, janitors, firemen, repair crews and outside crews.

"Your fourth question asks whether employees in branch warehouses and service stations engaged in maintaining stocks for repairs for trucks and in performing repair services for trucks are covered by the act. It has been a consistent ruling of the Department that where the bidder is a manufacturer the act applies to the manufacturing operations and not to the distribution of the product. It is understood that none of the employees of these branch units are engaged in manufacturing. Consequently these employees do not come within the act.

"The answers given to the foregoing questions, although directed primarily with regard to contracts for motor trucks, are sufficiently

broad to apply also to contracts for tractors, or for any other articles, materials, supplies or equipment contracted for in excess of \$10,000.

"I trust that this letter will clarify those features of the act which are of principal concern to your company, and that you will feel free to write again if other questions occur to you.

"Sincerely yours,

"GERARD D. REILLY,

"Acting Administrator, Public Contracts Act.

"Approved:

CHARLES O. GREGORY,

"Acting Secretary of Labor."

H. E. COLLINS,

Assistant Director of Procurement.

476

Defendants' Exhibit B

DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

WASHINGTON

DECISION OF THE SECRETARY

In the Matter of Determination of the Prevailing Minimum Wage
in the Men's Welt Shoe Industry

Therefore, I hereby determine—

That the minimum wage for employees engaged in the performance of contracts with agencies of the United States Government subject to the provisions of Public Act No. 846, 74th Congress, approved June 30, 1936, 49 Stat. 2036, for the manufacture or supply of men's welt shoes shall be 40 cents per hour or \$16 per week for a week of 40 hours, to be arrived at either upon a time- or piece-work basis.

This determination shall be effective and the minimum wage hereby established shall apply to all such contracts awarded on or after 15 days from the date hereof.

Dated this 21st day of December 1937.

FRANCES PERKINS.

Title 29, Chapter V Code of Federal Regulations, Part 534.

WAGE ORDER**MINIMUM WAGE RATES IN THE SHOE
MANUFACTURING AND ALLIED INDUSTRIES**

In the Matter of the Recommendation of Industry Committee No. 6 for a Minimum Wage Rate in the Shoe Manufacturing and Allied Industries.

APRIL 1940.

UNITED STATES DEPARTMENT OF LABOR**WAGE AND HOUR DIVISION****Section 534.4. Definition of Shoe Manufacturing and Allied Industries**

The Shoe Manufacturing and Allied Industries, to which this order shall apply, are hereby defined as follows:

(a) The manufacture or partial manufacture of footwear from any material and by any process except knitting, vulcanizing of the entire article or vulcanizing (as distinct from cementing) of the sole to the upper.

(b) The manufacture or partial manufacture of the following types of footwear, subject to the limitations of paragraph (a) but without prejudice to the generality of that paragraph:

Athletic shoes.

Boots.

Boot tops.

Burial shoes.

Moccasins.

Custom-made boots or shoes.

Puttees, except spiral puttees.

Sandals.

Shoes completely rebuilt in a shoe factory.

Slippers.

(c) The manufacture from leather or from any shoe-upper material of all cut stock and findings for footwear, including bows, ornaments, and trimmings.

(d) The manufacture of the following types of cut stock and findings for footwear from any material except from rubber or composition of rubber, molded to shape:

Outsoles.

Midsoles.

Insoles.

Taps.

Lifts.

Rands.

Toplifts.

Bases.

Shanks.

Boxtoes.

Counters.

Stays.

Strippings.

Sock Linings.

Heel pads.

478 (e) The manufacture of heels of any material except molded rubber, but not including the manufacture of wood-heel blocks.

(f) The manufacture of cut upper parts or footwear, including linings, vamps, and quarters.

(g) The manufacture of pasted shoe stock.

(h) The manufacture of boot and shoe patterns.

479

Defendants' Exhibit D

U. S. DEPARTMENT OF COMMERCE

Daniel C. Roper, Secretary

BUREAU OF THE CENSUS

William Lane Austin, Director

THE CENSUS OF MANUFACTURES, 1935, LEATHER
AND LEATHER PRODUCTS

LEATHER

Text and tables.....	Page 8
Text and tables.....	9
Text and tables.....	16
Text and tables.....	20
Text and tables.....	23
Text and tables.....	27
Text and tables.....	30
Text and tables.....	33
Text and tables.....	36

Prepared under the supervision of LeVerne Beales, Chief Statistician for Manufactures.

United States
Government Printing Office
Washington: 1937

Leather: Tanned, Curried, and Finished

Description of the industry.—This industry, as constituted for Manufactures Census purposes, embraces tanneries producing leather and establishments engaged in currying and finishing leather. Tanneries and other establishments working on contract report their receipts for work done but do not report the quantities or the values of leather produced, curried, or finished for others, nor the cost of the hides, skins, and leather treated. Some of this contract work is done for establishments in this industry, and these establishments report the value of their entire output of finished leather, including that tanned or otherwise treated for them on contract. Considerable amounts of contract tanning, currying, and finishing are done, however, on hides, skins, and leather owned by manufacturers in the Gloves, Clothing, and other industries, and some of the manufacturers in these industries curry and finish their own leather; and as neither the contractors nor the manufacturers in question report the amounts and values of leather thus tanned, curried, and finished, the figures in table 4 understate somewhat the total production of the several classes of leather.

Boots and Shoes, Other Than Rubber

Description of the industry.—The establishments classified in this industry are those whose principal products are boots, shoes, sandals, slippers, moccasins, and allied footwear, and leggings, overgaiters, etc., made chiefly of leather but to some extent of canvas and of other textile fabrics. Some of these establishments make only moccasins, sandals, spats, etc.

Boot and Shoe Cut Stock and Findings

Description of the industry.—(See "Change in classification," p. 1.) This industry embraces establishments engaged primarily in the manufacture, for sale as such, of soles, inner soles, heels (other than wood and rubber), lifts, counters, vamps, quarters, and other cut stock, and of finished wood heels, welting, shanks, and other findings. It does not, therefore, include the production of cut stock and findings by boot and shoe manufacturers for their own consumption. Rubber heels, soles, etc., are treated as products of the "Rubber Goods Other than Tires, Inner Tubes, and Boots and Shoes" industry. (See table 5.)

441

Defendants' Exhibit E

U. S. DEPARTMENT OF COMMERCE

Harry L. Hopkins, Secretary

BUREAU OF THE CENSUS

William Lane Austin, Director

THE CENSUS OF MANUFACTURES, 1937, LEATHER AND ITS
MANUFACTURES

LEATHER: TANNED, CURBED, AND FINISHED—REGULAR FACTORIES

LEATHER: TANNED, CURBED, AND FINISHED—CONTRACT FACTORIES

	Page
Text and tables.....	1
BELTING AND PACKING, LEATHER	
Text and tables.....	9
BOOT AND SHOE CUT STOCK AND FINDINGS	
Text and tables.....	12
BOOTS AND SHOES, OTHER THAN RUBBER	
Text and tables.....	17
GLOVES AND MITTENS, LEATHER	
Text and tables.....	23
SADDLERY, HARNESS, AND WHIPS	
Text and tables.....	25
TRUNKS, SUITCASES, AND WHEPCASES	
Text and tables.....	28
HANDBAGS AND PURSES, WOMEN'S LEATHER GOODS—SMALL ARTICLES, LEATHER GOODS NOT ELSEWHERE CLASSIFIED	
Text and tables.....	31

Prepared under the supervision of Thomas J. Fitzgerald,
Chief Statistician for Manufactures.

United States
Government Printing Office
Washington: 1939

482 Leather: Tanned, Curried, and Finished—Regular
Factories

Leather: Tanned, Curried, and Finished—Contract Factories

Description of the industries.—The first of these industries embraces chiefly those establishments primarily engaged in the manufacture of leather from hides, skins, etc., owned by them. The second industry covers those establishments which are primarily engaged in manufacturing or currying and finishing leather on contract for others. Some of the establishments in the regular factories classification also do some work on contract, while the contract factories manufacture a small amount from owned hides and skins.

Considerable amounts of leather are made also on contract for establishments in the Gloves, Clothing and other industries, but as neither the contractors nor the manufacturers report the amounts and values of leather thus made, the figures in table 4 understate somewhat the total production of leather.

Boot and Shoe Cut Stock and Findings

Description of the industry.—This industry embraces establishments engaged primarily in the manufacture, for sale as such, of soles, inner soles, heels (other than wood and rubber), lifts, counters, vamps, quarters, and other cut stock, and of finished wood heels, welting, shanks, and other findings. It does not, therefore, include the production of cut stock and findings by boot and shoe manufacturers for their own consumption. Rubber heels, soles, etc., are treated as products of the "Rubber Goods Other than Tires, Inner Tubes, and Boots and Shoes" industry.

Boots and Shoes, Other Than Rubber

Description of the industry.—The establishments classified in this industry are those whose principal products are boots, shoes, sandals, slippers, moccasins, and allied footwear, and leggings, overgaiters, etc., made chiefly of leather but to some extent of canvas and of other textile fabrics. Some of these establishments make only moccasins, sandals, spats, etc.

Defendants' Exhibit F

DEPARTMENT OF COMMERCE

BUREAU OF THE CENSUS

WASHINGTON

DECEMBER 31, 1940.

Sixteenth Census of the United States: 1940. (Preliminary report.) Industries Nos. 1211 and 1212.

CENSUS OF MANUFACTURES: 1939

Leather: Tanned, Curried, and Finished

This industry, as constituted for Manufactures Census purposes, embraces regular and contract establishments engaged in tanning, currying, and finishing leather. Tanneries and other establishments working on contract report their receipts for work done and the quantities of leather tanned, curried, and finished for others, but do not report the value of the leather tanned, curried, or finished nor the cost of the hides, skins, or leather treated. Some of this contract work is done for establishments in this industry, and these establishments report the value of their entire output of finished leather including that tanned or otherwise treated for them on contract. Considerable amounts of contract tanning, currying, and finishing are done, however, on hides, skins, and leather owned by manufacturers in the Gloves, Clothing, and other industries, and some of the manufacturers in these industries curry and finish their own leather; and as neither the contractors nor the manufacturers in question report the amounts and values of leather thus tanned, curried, and finished, the figures in this table understate somewhat the total production of the several classes of leather.

Defendants' Exhibit G

Approved Code No. 44—Reprint. Registry No. 904-1-05.

NATIONAL RECOVERY ADMINISTRATION

Code of Fair Competition for the Boot and Shoe Manufacturing Industry as Approved on October 3, 1933, by President Roosevelt; Includes Amendment No. 1

United States
Government Printing Office
Washington: 1934

SECTION 1. To cooperate with the President of the United States in effectuating the policy of Title 1 of the National Industrial Recovery Act the following provisions are established as a Code of Fair Competition for the Boot and Shoe Manufacturing Industry, comprising the manufacture of boots, shoes, sandals, slippers, moccasins, leggings, over-gaiters, and allied footwear chiefly of leather, and also footwear of canvas and other textile fabrics, together with such other products of the Boot and Shoe Industry as may from time to time be included in this Code.

485

Defendants' Exhibit H

Registry No. 930-1-01.

NATIONAL RECOVERY ADMINISTRATION

Code of Fair Competition for the Leather Industry as Revised on August 23, 1933, and as Approved on September 7, 1933,

by President Roosevelt

1. Executive Order of President Roosevelt.
2. Report of Administrator.
3. Report of Deputy Administrator.
4. Text of Code.

United States
Government Printing Office
Washington: 1933

Article 2—Definitions

The term "leather industry" shall be held to comprise all persons engaged in tanning or finishing leather, for further fabrication or for sale, for their own account or for the account of others, or performing any operation subsidiary thereto, or having leather tanned or finished in American factories, or engaged in the sale of American tanned or finished leather for their own account or

for the account of others, and persons, approved by the National Recovery Administration, engaged in the cutting or further partial fabrication of leather.

486

Defendant's Exhibit I

Approved Code No. 21—Amendment No. 2. Registry No. 930-1-01.

NATIONAL RECOVERY ADMINISTRATION

Amendment to Code of Fair Competition for the Leather Industry As Approved on October 3, 1934

United States
Government Printing Office
Washington: 1934

"The 'leather industry' is hereby classified into the following divisions:

"Bag Case and Strap.—Tanners of leather made from cattle hides of various types for the manufacture of traveling bags, luggage, and strap leather for various purposes.

"Calf and Kip.—Tanners of leather made from calfskin and cattle hides largely for the manufacture of shoes.

"Fancy.—Tanners of leather made from various types of hides and skins of animals, including reptilian leathers, suitable for fancy articles such as pocketbooks, suit-cases, handbags, etc.

"Goat and Cabretta.—Tanners of leather from goatskins and cabretta skins, mainly suitable for shoe purposes.

"Harness and Collar.—Tanners of leather from cattle hides suitable for horse equipment.

"Sheep and Glove.—Tanners of sheep skins suitable largely for garments, gloves, and shoe linings; also hat and capsweat leathers as produced by the National Hat and Capsweat Leather Association.

"Sole and Belting.—Tanners of leather made from cattle hides for the manufacture of shoes and industrial belting.

"Upper, East, West.—Tanners of leather, including japaners (finishers), largely made from cattle hides and kips (small cattle hides) suitable for the manufacture of shoes.

487 "Upholstery.—Tanners of cattlehide leather suitable for use in the manufacture of furniture, automobiles, etc.

"Leather Belting Division.—Manufacturers of industrial belting, lace leather, and leather laces, miscellaneous straps, packings (hydraulic and otherwise), and mechanical leathers (wholly or principally of leather) for use on industrial machinery, excluding such leather that a machinery manufacturer may produce for use on equipment of his own manufacture.

"Cut Soles.²—Tanners and/or cutters and producers of leather soles used in the manufacture of shoes.

"Welting.—Tanners and manufacturers of welting leather and/or leather welting used in the manufacture of shoes.

"Grain Insoles, Counters, Fox Toes, and Heels.—Tanners and/or manufactures of leather used in these products and/or manufacturers of these products themselves used in the manufacture of shoes.

"The term 'member of the industry' as used herein includes, but without limitation, any individual, partnership, association, corporation or other form of enterprise engaged in the industry either as an employer or on his or its own behalf."

488

Defendants' Exhibit J.

Approved Code No. 156. Registry No. 899-04.

NATIONAL RECOVERY ADMINISTRATION

Code of Fair Competition for the Rubber Manufacturing Industry as Approved on December 15, 1933, by President Roosevelt

United States
Government Printing Office
Washington: 1933

CHAPTER I

ARTICLE I—A. DEFINITIONS

SECTION 1. The term "Rubber Manufacturing Industry" or "Industry" as used herein means the manufacture for sale in the

continental United States (including Alaska) of any rubber product or products, expressly excluding, however, all solid and pneumatic tires and pneumatic tubes, and tire accessories and/or tire repair materials, together with such other rubber products as may be specifically covered by another duly approved Code of Fair Competition.

Sec. 2. The term "Division of the Industry," as used herein, includes the several branches of the Industry which have been or may hereafter be established, as herein below provided, as administrative units, under the provisions of this Code. The Divisions immediately established and defined in Chapters II to X are:

Automobile Fabrics, Proofing, and Backing Division.

Rubber Flooring Division.

Rubber Footwear Division.

Hard Rubber Division.

Heel and Sole Division.

Mechanical Rubber Goods Division.

Sponge Rubber Division.

Rubber Sundries Division.

Rainwear Division.

489

CHAPTER IV—RUBBER FOOTWEAR DIVISION

ARTICLE I—A. DEFINITION

SECTION 1. The Rubber Footwear Division shall consist of all members of the Industry engaged in the manufacture for sale or wholesale sale by manufacturers, or any subsidiary or affiliate of the same, of all types of so-called "Waterproof and Canvas Rubber-Soled Footwear."

CHAPTER VI—HEEL AND SOLE DIVISION

ARTICLE I—A. DEFINITION

SECTION 1. The Heel and Sole Division shall consist of all members of the Industry engaged in the manufacture for sale of rubber heels, soles, soling sheets, strips, taps, sport soles, sport heels, stick-on soles and heels, and rubber heel and sole cement.

Opinion of August 19, 1941

United States District Court, Northern District of New York

[Same title]

BRYANT, D. J.

A hearing has been had in conformity with my decision (37 Fed. Sup. 604). The present issue is whether or not an order, directing defendants to obey an administrative subpoena duces tecum, should issue.

My decision (*supra*) sets forth the facts leading up to the controversy in sufficient detail to obviate the necessity, except in a few instances, of a re-statement.

The Endicott-Johnson Corporation is an integrated industry. It is plaintiff's contention that all of the corporation's factories and departments, regardless of where located and how operated, wherein materials, which went into the articles manufactured, were made or in any manner worked upon, are within the provisions of the so-called Walsh-Healey Act, and that the pay rolls and records of these varied factories and departments are subject to inspection by representatives of the Division of Public Contracts of the Department of Labor.

Plaintiff further contends that this Court is without authority to determine whether or not the request for an order compelling obedience to an administrative subpoena is well grounded. She says that it is her right to determine whether or not the corporation's varied and numerous factories and departments are covered by the Act. I am not aware that I have held otherwise. Had the Secretary of Labor made such a finding this controversy would not be here. Her complaint contains no allegation of such a finding. In fact it states the opposite. A considerable portion

491 of her brief is directed to the proposition that the allegation "the Secretary of Labor has reason to believe" deprives the Court of all discretionary power. Like an automaton, it must make the order requested. The last two contentions are not here germane. I ruled upon them in my opinion (*supra*).

The defendants maintain, and have consistently maintained, that the stipulations in the contract, required by Sec. 1 of the Walsh-Healey Act, apply only to the corporation's footwear factories. Generally, they maintain: (1) That the tanning of leather, the manufacture of rubber soles and heels, cut soles, counters and cartons are all separate, distinct and unrelated industries from the manufacture of footwear; that, being separate and distinct industries, the stipulations, included in a contract limited to the manufacture of footwear only, do not apply. (2) That Endicott-Johnson Corporation, in the tanning of leather and in the

manufacture of the articles named, was not a manufacturer subject to the stipulations of the contract because its tanneries, rubber mills, etc., were not engaged in producing upon the premises any of the articles of the general character described in the footwear specifications. (Art. 101 of Regulations covering the Act.)

I shall consider defendants' last contention first. The Act provides that the contract must contain a stipulation that the contractor is either a manufacturer of, or a regular dealer in, the articles to be manufactured or used in the performance of the contract. (Walsh-Healey Act. Sec. 1; 41 U.S.C.A. Sec. 35.) Subd. (a) and (b) of Art. 101 of the Regulations of 1937, covering the Act, simply give the Department's definitions of manufacturer and dealer. They read:

492 “(a) A manufacturer is a person who owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

“(b) A regular dealer is a person who owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.”

These definitions are for the purpose of determining who may receive contracts. Their purpose is spent when the contract is awarded. Any limitations therein stated cannot be construed as a limitation on the construction to be placed upon subd. (b) and (c) of Sec. 1 of the Act, which set forth the stipulations in controversy here.

In accordance with the provisions of Sec. 1 of the Act the stipulations contained in subdivisions (b) and (c) thereof were embodied in the contracts. These stipulations are that all persons “employed by the contractor in the manufacture or furnishing of the material, supplies, articles, or equipment used in performance of the contract” will be paid certain minimum wages and that they will not be permitted to work over forty hours per week, except as they are paid for overtime.

My attention has not been called to any authorities bearing directly upon the application of the stipulations in connection with integrated industries. Plaintiff has cited large numbers of cases, but the facts upon which they are based made them inapplicable to the issue here. The list is so lengthy that separate distinguishment is impossible.

Plaintiff, by permission, submitted with her brief several rulings of the Department of Labor made by letter. She, also

493 by permission, included in her brief oral rulings on coverage of employees in integrated industries. The above, with the Rulings and Interpretations issued by the Department on July 6, 1937, and Sept. 29, 1939, have been carefully studied. I believe I am safe in saying that I am in accord with the rulings that have been brought to my attention. As I interpret the submitted rulings, the Act covers those employees, regardless of location of factories or departments, whose tasks are a part of and normally associated with the production of the contracted articles. Perhaps it would be clearer to state that the Act covers in all factories where the production is a part of an uninterrupted process of manufacture. Negatively speaking, the Department does not claim coverage over manufacture of materials taken from general stock for use in performance of the contract. To make such a claim would give the statute a retroactive application. The Act does not cover employees working on parts where, until after manufacture, it is impossible to determine whether the parts are suitable for use under the contract. Such employees are manufacturing for general stock as distinguished from working on contracts. This is so even though some of the parts, after manufacture, are selected as suitable material for manufacture under the contracts. The above seem to be the interpretations placed upon the Act by a letter of Administrator Walling, dated April 26, 1939, and by letters of Acting Administrator Reilly, dated January 9, 1937, and December 30, 1938. The other letters submitted do not apply to the facts in this case.

At the time of the making of the contract, and during the period of performance, there were no published Rules relating to coverage of employees in integrated industries. After the beginning of this dispute Sec. 2 of the Rules of Sept. 29, 1939, were
494 published. This section seems to be a codifying of the interpretations stated above. The gist of the section is that "the Act is applicable to those departments which are engaged in the manufacture of the materials or supplies to be so incorporated into or used in the manufacture or processing of the ultimate product to be delivered to the Government as well as to the employees engaged in the manufacture or processing of that ultimate product." This section neither adds nor subtracts from the interpretations heretofore stated. To hold otherwise would be the placing of a construction on the Act that could easily lead into the realm of impossibility. It, also, would be a reversal of the very rulings which the Department has submitted for the Court's guidance.

It now only remains to apply the Department's rulings, with which I agree, to the present facts.

The leather, or most of it, used in the manufacture of the boots and shoes, called for by the contracts, was tanned in the corporation's tanneries located at considerable distances from the factories designated for manufacture.

The so-called Upper Leather Tannery and Calf Skin Tannery make chrome leather for use in the manufacture of the upper part of shoes and boots. According to the testimony the hides are washed, cleaned, and dehaired; then they go through the "pickling operation" and then through the solution which is the actual chrome tanning. I cannot see that anything will be gained by describing the operations used in these various steps. When the hides are taken from the chrome tanning they are known as "Blue" because of the color. The process to this stage takes about fifteen days. Up to this stage all hides are handled in the same manner and it is impossible to determine the use to which any can be put. In the Blue Department
495 the different kinds of leather, which have been tanned, are tentatively sorted and marked by punch holes in the back of the hides. When the corporation has Government contracts the sorter punches the best hides as possibly suitable for Government use. The hides then go through the splitting machines, the dyeing room, the stacking machines and the buffing operations. In the buffing room, the packs are again examined and regraded. The leather then goes through the finishing room and from there to the shipping department where it is definitely sorted and graded.

Regarding the marking in the so-called Blue Department in the Calf Skin Tannery, there is some dispute, but not a material one. One of the plaintiff's witnesses, who visited the tannery some time in November 1939, testified that some inspector was sorting hides for use under the contracts and stamping same with an ink stamp bearing the mark "Gov't" or "G. C." The testimony satisfies me that the witness was mistaken. Evidently the witness mistook the sorter for an inspector. To use an ink stamp at this stage of the tanning process would be a futile act. However, as stated before, the dispute is immaterial because the witness agrees with defendants that it "is no selection that is ultimately used."

The various steps taken in the hides' travel through the two tanneries, briefly outlined above, lead me to the conclusion that in reality the leather used under the contracts was taken from stock. The hides were not tanned for any particular use. Selections were made in the stock room. True, there were tentative selections in the Blue and Buffing Departments. At best these were cursory piling of different grades. The different packs or grades travelling from the Blue Department through the

496 buffing operation do not take separate routes. The different packs go through together so that segregation of employees to different grades would be impracticable. The suitability of the hides for Government use could not be determined until the tanning operations were completed. This is borne out by the fact that only about fifteen percent of the hides were found suitable for the contracts.

The sole leather is vegetable tanned. It takes about sixty-five days to complete the tanning operation. No tentative selections or gradings are made. Until the leather reaches the stock room, and is graded for kind, quality, and thickness, it is impossible to determine the kind of shoes for which it is suitable. It must, therefore, be said that all operations are for the making of stock. During the period in question approximately five percent of the stock was used in Government orders. The stock is disposed of upon orders from factories calling for sole leather of such quality, thickness, etc.

In the performance of the contracts in question, the various designated factories called for sole leather of certain thicknesses. This was sent from the stock room of the sole leather tannery to the sole cutting department. There it was cut into soles and graded for size, surface, quality, and thickness. A Government Inspector then re-sorted them. From the pile of manufactured soles he selected the ones to be used in the contracts and placed a Government stamp on each piece. These were shipped to the designated factory. These represented about 5 percent of the soles cut during the period.

I find no testimony bearing directly on the manufacture of counters. From the record, I gather that their
497 manufacture, grading, inspection, and selection followed the same course last above stated.

The rubber heels and soles used in the contract could not be selected until they had been taken from the molds and sorted and graded as to defects, sizes, etc.

I can place no other construction on the operations than that of manufacture for stock. I am unable to differentiate between a man going to a stock pile and selecting certain articles and a man standing at the tail end of an operation and making a selection of the same articles before they are piled. To me both operations mean selection from stock.

The carton factory makes the cartons for all factories manufacturing shoes, boots, arctics, etc. The evidence does not show the method of manufacture. From the record, I infer the cartons are fashioned to size. Presumably the factory makes and keeps on hand sufficient quantities of different sized cartons to meet requisitions from the various factories. If such be the fact, then the cartons are made for stock. Regardless of that,

I cannot say that pasteboard boxes are "materials required" under contracts calling for the manufacture of shoes and overshoes, nor that the makers thereof are "workers on tasks normally associated with the manufacture of shoes." This last applies as well to the operations of the tanneries and rubber mill. These, as well as the carton factory, are classified in the yearly Census of Manufacturers as separate, distinct, and unrelated industries from the shoe manufacturing industry. Under the provisions of the National Industrial Act these industries and the shoe manufacturing industry had separate and distinct Codes 498 of Fair Competition. The Administrator of the Fair Labor Standards Act of 1938 and the Secretary of Labor have recognized the distinction in the fixing of wage codes. Being unrelated industries, they should not come under the provisions of the Act unless the proof clearly shows manufacture of materials for use in the contracts as distinguished from manufacture for stock.

In this proceeding it is not my province to make a finding that the employees of the factories in question are or are not covered by the stipulations of the Walsh-Healey Act. That is a prerogative belonging to the Secretary of Labor. If the employees are covered then the Secretary has a right to examine the time and pay roll records of those factories, otherwise not. Without such a finding having been made, this Court was asked to compel the corporation to produce their records for inspection. The court demanded proof showing good reason to believe that the records were subject to inspection. (Securities and Exchange Commission v. Tung Corporation, 32 Fed. Sup. 371.) Without such proof this Court, through the issuance of such an order, would be aiding the Labor Department in carrying out an "extra-legal inquisition." (National Labor Relations Board v. New England Transportation Co. 14 Fed. Sup. 497.)

The facts do not satisfy me that the records sought are subject to inspection. I, therefore, deny plaintiff's application.

An Order may be presented on notice.

Dated August 19th, 1941.

(Sgd.) **FREDERICK H. BRYANT,**
Frederick H. Bryant,
United States District Judge.

499

Final Order and Judgment

District Court of the United States, Northern District of New York

[Same title.]

This cause came on to be heard and was argued by counsel; and thereupon, upon consideration thereof it is

Ordered that the plaintiff's renewed motion for a judgment on the pleadings be and the same hereby is denied, and it is further

Ordered that the plaintiff's renewed motion for summary judgment be and the same hereby is denied, and it is further

Ordered, adjudged, and decreed that the plaintiff's complaint and application is denied and dismissed.

Dated October 22, 1941.

FREDERICK H. BRYANT,
United States District Judge.

(Foregoing judgment dated October 22, 1941, was entered October 27, 1941.)

500

Notice of Appeal

District Court of the United States, Northern District of New York

[Same title.]

Notice is hereby given that Frances Perkins, Secretary of Labor of the United States, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final order and judgment entered in this action and proceeding on October 27, 1941.

Dated November 4, 1941.

FRANCIS M. SHEA,

Assistant Attorney General, Washington, D. C.

RALPH L. EMMONS,

United States Attorney, Binghamton, N. Y.

Attorneys for Appellant.

501

Petition for Appeal

District Court of the United States, Northern District of New York

[Same title.]

To the Honorable FREDERICK H. BRYANT, Judge of the District Court of the United States for the Northern District of New York:

Frances Perkins, Secretary of Labor of the United States, who is the plaintiff in the above-entitled cause, prays that she may be permitted to take an appeal from the final order and judgment entered in the above cause on the 27 day of October 1941 to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed

herewith, that a citation be issued as provided by law, and that a transcript of the record, proceedings, and papers in the above-entitled cause, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated November 4, 1941.

FRANCIS M. SHEA,
Assistant Attorney General,

RALPH L. EMMONS,
United States Attorney,
Attorneys for Frances Perkins,
Secretary of Labor of the United States.

502 *Assignment of Errors*
District Court of the United States, Northern
District of New York

[Same title.]

The plaintiff, Frances Perkins, Secretary of Labor of the United States, now shows that the District Court of the United States for the Northern District of New York committed error in the following respects, upon which errors she will rely in the prosecution of the appeal in the above-entitled cause, for which petition is herewith made:

1. The court erred in denying plaintiff's motions for judgment on the pleadings, and for summary judgment.
2. The court erred in denying plaintiff's renewed motions for judgment on the pleadings, and for summary judgment.
3. The court erred in ordering a hearing for the taking of evidence on plaintiff's application for the enforcement of the subpoenas issued by the Secretary of Labor pursuant to the Public Contracts Act, and in taking evidence.
4. The court erred in holding that defendants, in their response to plaintiff's motions for judgment on the pleadings and summary judgment raised a material substantial issue of fact.
5. The court erred in holding, in its opinion of February 1, 1941, that it would decide for itself whether the Public Contracts Act covered the employees in the factories and
503 departments claimed by defendants not to be covered by the Act, and it erred, in its opinion of August 19, 1941, in deciding that issue for itself.
6. The court erred in denying plaintiff's renewed motions for judgment on the pleadings and for summary judgment.

7. The court erred in holding, in its opinion of August 19, 1941, that the plaintiff had not found and determined that the employees in the factories and departments in question were covered by the Public Contracts Act.

8. The court erred in holding that the plaintiff did not have reason to believe, or good reason to believe, that the employees in the factories and departments in question were engaged in the performance of Government contracts, and were covered by the Public Contracts Act.

9. The court erred in holding that the employees in the factories and departments involved were not engaged in the performance of Government contracts, and were not covered by the Public Contracts Act.

10. The court erred in holding that the manufacturing carried on in the eight factories and departments in question was manufacturing for stock.

11. The court erred in holding that the cartons were not materials required under the Government contracts.

12. The court erred in holding that, for purposes of the Public Contracts Act, employees working in the tanneries, rubber plant, and carton factory were not engaged in tasks normally associated with the manufacture of shoes, but in work carried on in separate and unrelated industries.

13. The court erred in holding that in the case of the tanneries, rubber plant, and carton factory, an extraordinary showing of manufacture for specific use in the performance of Government contracts, rather than manufacture for stock, must be made.

504 14. The court erred in failing to hold that the materials processed in the eight factories and departments in question were materials, supplies, articles, or equipment used in the performance of Government contracts.

15. The court erred in failing to hold that the persons employed in the eight factories and departments in question were employed in the manufacture or furnishing of the shoes and boots called for by the Government contracts.

16. The court erred in refusing to admit evidence on behalf of plaintiff as follows: certified copies of correspondence between officials of the Division of Public Contracts of the Department of Labor and various companies having Government contracts subject to the Public Contracts Act; the letters from the Public Contracts Division contained rulings as to whether certain processes carried on by these companies were or were not within the coverage of the Public Contracts Act (Exhibits 4-A to 4-E for identification).

17. The court erred in refusing to admit evidence on behalf of the plaintiff as follows: certified copy of an interoffice memoran-

dum from William B. Grogan, Chief Examiner, Division of Public Contracts, to L. Metcalfe Walling, Administrator of the Division of Public Contracts, containing Mr. Grogan's contemporaneous record of a conference held on March 17, 1939, by him with defendant Swartwood and another official of defendant Endicott Johnson Corporation; the memorandum states that at this conference these officials admitted that the greatest part of boots and shoes manufactured for the United States were manufactured by integrated concerns such as defendant Endicott Johnson Corporation (Exhibit 7 for identification).

505 18. The court erred in refusing to admit evidence on behalf of the plaintiff as follows: memorandum prepared by the Statistical Section, Division of Public Contracts, Department of Labor, entitled "Contracts for Boots and Shoes Subject to the Provisions of the Walsh-Healey Act, September 28, 1936 to January 1, 1939," and showing the number of awards to each manufacturer, the value of the awards, and the percentage of total value awarded to each contractor; the memorandum shows that about 70% of the total value was awarded to integrated concerns (Exhibit 8 for identification).

19. The court erred in refusing to admit evidence on behalf of plaintiff as follows: letter dated December 5, 1939, from Mary P. Hogue, investigator for the Division of Public Contracts, to Ralph J. Fogg, Chief of Investigation Section, Division of Public Contracts; this letter contains a statement by Investigator Hogue that when she inspected defendant's tannery "I found inspectors for the government inspecting hides and accepting certain hides and rejecting others there in the tannery. At their direction hides were so stamped with a government stamp" (Exhibit 10 for identification).

20. The court erred in refusing to admit evidence on behalf of plaintiff as follows: report from Mary P. Hogue, investigator for the Division of Public Contracts; received November 28, 1938, by the Division, concerning her inspection of defendant Endicott Johnson Corporation's plants and records; the report summarized certain conversations Investigator Hogue had with defendant's supervisors in charge of the tanneries (Exhibit 14 for identification).

506 21. The court erred in refusing to admit evidence on behalf of plaintiff as follows: joint report, dated February 16, 1939, from Investigators Stevenson and Hogue to Ralph J. Fogg, Chief of the Investigation Section; this report summarized a conference had with defendant Swartwood and with Mr. Charles Johnson, officers of defendant corporation, in which Mr. Johnson stated "that it was possible to lift the leather used in the manufacture of the soles and heels of these shoes from

stock. He stated, however, that he had no records for verification of this statement, and that in all probability a large portion of the leather was processed and used in the manufacture of shoes during the lifetime of the contracts. He also stated that the leather used in the upper part of the shoes required a special treatment and could not have possibly been treated or processed prior to the time they received these awards." (Exhibit 15 for identification.)

22. The court erred in sustaining the objection of defendant's counsel to the following questions propounded by plaintiff's counsel to the witness William B. Grogan, i. e.:

Q. Will you state whether the Division has anything to do with supplying the designations of place of manufacture or supply?

Q. Will you state of your own knowledge whether there has been any communication with you, or, so far as you know, to the Division, with respect to what plant or factory should be inserted in the contract, or notices of award?

Q. Under the regular practice of the Division, in the course of its business under the Walsh-Healey Act, Mr. Grogan, does the specification of the place of performance in the contract determine or restrict the plants to which the Division sends its investigators?

507 Q. As Chief Legal Officer of the Division, of course you are personally familiar with any cases where the contracts do not stipulate any place of performance whatever?

After allowance of the objections to these questions, plaintiff's counsel stated for the record that if the witness were allowed to testify he would show it is a consistent practice of the Division not to regard itself as bound by the specifications of the factory in the contract or the notice of award. This statement or offer of proof was then stricken from the record by the court, in which action the court erred.

23. The court erred in sustaining the objection of defendants' counsel to the following question propounded to the witness Grogan by plaintiff's counsel, i. e.:

Q. What plants did these indicate were being investigated?

24. The court erred in sustaining the objection of defendants' counsel to the following questions propounded to the witness Grogan by plaintiff's counsel, i. e.:

Q. Are you personally familiar with the practice and rulings of the Division, made in the application of those regulations?

Q. As Chief Legal Officer, have there been submitted to you questions under those Articles that have been cited, which involve the question of whether work performed under Government contracts by employees of a contractor who are also working on

inseparable work for commercial contracts, or for other contracts not connected with the Government contract, are subject to the Walsh-Healey Act with respect to any portion or all of their work?

508 Q. Has the action taken by the Public Contracts Division in connection with the Endicott Johnson Corporation, in so far as coverage of the tanneries, rubber mills, and other departments is concerned, differed in any way from the action taken by the Division in any other similar case involving manufacture by the contractor of the raw, semifinished, or intermediate products which went into the fulfilling of the Government contract?

Q. Will you state to the court what the facts and circumstances [surrounding the promulgation of the interpretation and ruling on "Integrated Establishment" in Ruling and Interpretations, No. 2 under the Walsh-Healey Public Contracts Act, paragraph 2] are?

Q. To your knowledge, Mr. Grogan, did this paragraph I called to your attention change the existing rule in the Division?

Q. Have you, as Chief Legal Officer of the Division, participated in making, or made any legal rulings contrary to the provision of paragraph 2, before the date of its promulgation?

Q. Do you have personal knowledge of any cases before the Division, at, before, or during, the time when the Endicott Johnson contracts were in operation, which involved the manufacture by a contractor of raw, semifinished, or intermediate materials, in industries where the competitors of that contractor normally did not manufacture the same type of raw, semifinished, or intermediate materials?

509 25. The court erred in sustaining the objection of defendants' counsel to the following questions propounded to the witness Grogan by plaintiff's counsel, i. e.:

Q. Will you state [the facts and circumstances which immediately preceded and which took place at the time the letter of February 23, 1939, from L. Metcalfe Walling to Mr. Charles Johnson was sent] to the court?

Q. Will you state [the facts and circumstances which immediately followed the sending of that letter] to the court?

26. The court erred in sustaining the objection of defendants' counsel to the following question propounded to witness Grogan by plaintiff's counsel, i. e.:

Q. Will you state from your recollection and knowledge, based upon the studies made under your direction by this bureau in the Public Contracts Division, what percentages of Government contracts, for shoes and boots, which were awarded from the date of the formation of the Public Contracts Division until

January first, 1940, were awarded to companies which manufacture their own rubber heels and soles, and tan their own leather!

27. The court erred in sustaining the objection of defendants' counsel to the following question propounded to the witness Grogan by plaintiff's counsel, i. e.:

Q. Would you state [the facts and circumstances under which the letter of July 15, 1939, from L. Metcalfe Walling, Administrator, to Mr. Charles F. Johnson, Jr., was written] please!

Q. Will you state whether the ruling in that letter constituted a deviation or exception from the position of the Division which had been followed, to your knowledge, to that time and before?

510 28. The court erred in sustaining the objection of defendants' counsel to the following questions propounded to the witness Grogan by plaintiff's counsel, i. e.:

Q. Did you recommend, Mr. Grogan, as Chief Legal Officer of the Division, that an Administrative Proceeding be instituted against the Endicott Johnson Corporation?

Q. As Chief Legal Officer of the Division, Mr. Grogan, did you believe that the employees of the Endicott Johnson Corporation engaged in tanning leather, cutting soles and heels, and manufacturing rubber for soles and heels, in plants and departments of the Defendant corporation, Endicott Johnson, were engaged in the performance of these fifteen contracts?

Q. Did you take any official action, Mr. Grogan, immediately prior to the institution of the Administrative Proceeding, in October 1939, against the Endicott Johnson Corporation?

Q. Will you state from your personal knowledge, Mr. Grogan, from your official knowledge as Chief Legal Officer of the Public Contracts Division, what information, documents, and other papers, were before the Division prior to the issuance of the Administrative Complaint in October 1939?

29. The court erred in sustaining the objection of defendants' counsel to the following questions propounded to the witness George H. Roller by plaintiff's counsel, i. e.:

Q. In your experience as an Investigator, have you come across instances in which the contractor performed other processes, and other steps, other than the final fabrication of the products?

511 Q. As an investigator for the Public Contracts Division do you understand that your duties are to inspect books and records for plants other than those specified in your notice of award?

Q. What has been your conduct with respect to the inspection of books and records of a plant not mentioned in the notice of award which you receive?

30. The court erred in sustaining the objections of defendants' counsel to the following questions propounded by plaintiff's counsel to the witness Mary P. Hogue, i. e.:

Q. Will you state what knowledge you have, based on your investigation and visits to the plants of the Endicott Johnson Corporation, concerning the manufacture by them of leather or rubber or counters or cartons for shoes, under the Government contracts?

Q. Mrs. Hogue, based on your visits to the premises of Endicott Johnson Corporation, will you state what you know, what you have found out from those visits personally, with respect to whether or not the leather and the rubber came from stock piles which existed prior to this award?

31. The court erred in denying plaintiff's application for enforcement of the subpoenas and in rendering final judgment against plaintiff.

To all these rulings, plaintiff's counsel duly objected and excepted, and the court furthermore allowed a general exception to all rulings adverse to plaintiff.

512 Wherefore, plaintiff prays that the said final order and judgment may be reversed and for such other and further relief as to the court may seem just and proper.

Dated November 4, 1941.

FRANCIS M. SHEA,
Assistant Attorney-General.
RALPH L. EMMONS,
United States Attorney,
Attorneys for Appellant.

513

Order Allowing Appeal

District Court of the United States, Northern District of New York

[Same title.]

The petition of Frances Perkins, Secretary of Labor of the United States, plaintiff in the above-entitled cause, for an appeal from the final judgment and order entered in this cause, is hereby granted and the appeal is allowed.

It is further ordered that a certified transcript of the record and proceedings in this cause be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated November 5, 1941.

FREDERICK H. BRYANT,
United States District Judge.

District Court of the United States, Northern District of New York

[Same title.]

To ENDICOTT JOHNSON CORPORATION and HOWARD A. SWARTWOOD,
greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Second Circuit at the City of New York, N. Y., forty days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Northern District New York, in a proceeding wherein Frances Perkins, Secretary of Labor of the United States, is appellant and you are appellees, to show cause, if any there be, why the final judgment and order rendered against said Frances Perkins should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frederick H. Bryant, Judge of the District Court of the United States for the Northern District of New York, this 12th day of November 1941.

FREDERICK H. BRYANT,

*Judge of the District Court of the United States
for the Northern District of New York.*

Form No. 282.

UNITED STATES OF AMERICA,

Northern District of New York, ss:

I hereby certify and return that I served the annexed Citation on the therein-named Howard A. Swartwood, Secretary, Endicott Johnson Corporation, by handing to and leaving a true and correct copy thereof with Howard A. Swartwood, personally at 27 Grand Blvd., Birmingham, N. Y., in said District on the 15th day of November 1941.

JESSEE JACOBS, U. S. Marshal.

By GERALD P. O'CONNOR, Deputy.

Form No. 282.

UNITED STATES OF AMERICA,

Northern District of New York, ss:

I hereby certify and return that I served the annexed Citation on the therein-named Endicott Johnson Corporation, a corporation, by handing to and leaving a true and correct copy thereof

with Howard A. Swartwood, Secretary, Endicott Johnson Corporation, personally, at 27 Grand Blvd., at Binghamton, N. Y. in said District on the 15th day of November 1941.

JESSEE JACOBS, *U. S. Marshal.*
By GERALD P. O'CONNOR, *Deputy.*

517

Stipulation re Bill of Exceptions, etc.

District Court of the United States, Northern
District of New York

[Same title.]

It is hereby stipulated and agreed that the reporter's transcript of the hearing held at Syracuse, New York, on April 24 and April 25, 1941, as corrected, together with the exhibits admitted into evidence or marked for identification at that hearing, shall be considered the equivalent of and shall constitute a bill of exceptions or statement of evidence, or both, for the purposes of the appeal in the above-entitled cause, and that no other or further bill of exceptions or statement of evidence, or either, shall be necessary or required, and that an order to such effect may be entered by either party herein without notice to the other.

Dated Nov. 19th, 1941..

FRANCIS M. SHEA,
Asst. Atty. General,
Attorney for Plaintiff.
HOWARD A. SWARTWOOD,
WILLIAM H. PRITCHARD,
Attorneys for Defendants.

518

Order Re Bill of Exceptions, Etc.

District Court of the United States, Northern District
of New York

[Same title.]

On the annexed stipulation, and on motion of Francis M. Shea, Assistant Attorney General, and Ralph L. Emmons, United States Attorney, attorneys for appellant, it is

Ordered that the reporter's transcript of the proceedings herein held at Syracuse, New York, on April 24 and April 25, 1941, as corrected, together with the exhibits marked for identification or admitted into evidence at that hearing, is accepted as a bill of exceptions or statements of evidence, or both, and is approved

and made a part of the record in the above-entitled cause.

Dated November 21, 1941.

FREDERICK H. BRYANT,
United States District Judge.

Filed November 25, 1941.

519 *Stipulation as to Exhibits to Be Transmitted Physically*

District Court of the United States, Northern District
of New York

[Same title.]

It is hereby stipulated and agreed that the originals of the following exhibits or parts of exhibits admitted into evidence or marked for identification at the hearing held at Syracuse, New York, on April 24 and April 25, 1941, may be physically transmitted to the United States Circuit Court of Appeals for the Second Circuit as part of the record in the above-entitled cause; and it is

Further stipulated that the printing of the said exhibits or parts of exhibits may be dispensed with, and that three copies of each may be handed up to the court by either party on the argument of the appeal; and that either party may refer to or print any portion of these exhibits in its briefs in the Circuit Court of Appeals; provided that certain portions of certain of the following exhibits are to be printed in the printed record on appeal as indicated:

Plaintiff's Exhibits 1-A to 1-O (incl.) (15 contracts; portions of Exhibit 1-B to be printed as agreed).

Plaintiff's Exhibits 2-A to 2-O (incl.) (15 notices of award; exhibit 2-B to be printed as agreed).

520 Plaintiff's Exhibits 3-A and 3-B (pamphlets containing rulings and interpretations of the Public Contracts Acts; portions of these exhibits are to be printed as agreed).

Plaintiff's Exhibit 5 (Inspection Report).

Plaintiff's Exhibit 14 (Investigator's report; a portion of this exhibit is to be printed as agreed).

Defendant's Exhibit B (Wage determination under the Public Contracts Act; a portion of this exhibit is to be printed as agreed).

Defendant's Exhibit C (Wage order under the Federal Labor Standards Act; a portion of this exhibit to be printed as agreed).

Defendant's Exhibit D (Census report; a portion of this exhibit is to be printed as agreed).

Defendant's Exhibit E (Census report; a portion of this exhibit is to be printed as agreed).

Defendant's Exhibit F (Census report, a portion of this exhibit is to be printed as agreed).

Defendant's Exhibit G (Boot and Shoe Manufacturing Industry Code; a portion of this exhibit is to be printed as agreed).

Defendant's Exhibit H (Leather Industry Code; a portion of this exhibit is to be printed as agreed).

Defendant's Exhibit I (Amendment to Leather Industry Code; a portion of this exhibit is to be printed as agreed).

Defendant's Exhibit J (Rubber Mfg. Industry Code; a portion of this exhibit is to be printed as agreed).

FRANCIS M. SHEA,

Asst. Atty. Gen.

Attorney for Plaintiff.

HOWARD A. SWARTWOOD,

WILLIAM H. PRITCHARD,

Attorneys for Defendants.

Dated November 24, 1941.

321 *Order as to Transmission of Physical Exhibits*

District Court of the United States, Northern District of New York

[Same title.]

On the annexed stipulation, and on motion of Francis M. Shea, Assistant Attorney General, and Ralph L. Emmons, United States Attorney, attorneys for appellant, it is

Ordered that the following original exhibits admitted in evidence or marked for identification in the above-entitled cause be physically transmitted to the United States Circuit Court of Appeals for the Second Circuit as part of the record in the above-entitled cause:

Plaintiff's Exhibits 1-A to 1-O.

Plaintiff's Exhibits 2-A to 2-O.

Plaintiff's Exhibits 3-A and 3-B.

Plaintiff's Exhibit 5 and 14.

Defendants' Exhibits B, C, D, E, F, G, H, I, and J.

Dated November 29, 1941.

FREDERICK H. BRYANT,

United States District Judge.

Entered December 2nd, 1941.

District Court of the United States, Northern District of
New York

[Same title.]

Appellant, Frances Perkins, Secretary of Labor of the United States, moves this court that she be granted until January 10, 1942, to file the transcript of record on appeal in this action and to docket the appeal, and until December 27, 1941, to file with the Clerk of this court a copy of the proposed record on appeal.

FRANCIS M. SHEA,
Assistant Attorney General,
RALPH L. EMMONS,
United States Attorney,
Attorneys for Appellant.

Dated November 22, 1941.

We consent to the granting of this motion.

HOWARD A. SWARTWOOD,
WILLIAM H. PRITCHARD,
Attorneys for Defendants.

So ordered.

G. A. PORTER,
*Clerk, District Court of the United States for the
Northern District of New York.*

Dated Nov. 28th, 1941.

(By two successive similar orders, each duly and timely entered on consent of all parties before expiration of the periods for filing and for docketing the appeal prescribed by the order preceding it, the time to file copies of the proposed record on appeal with the Clerk of the District Court was extended until January 17, 1942, and the time to file the transcript of the record and to docket the appeal in the Circuit Court of Appeals was extended until January 31, 1942.)

District Court of the United States, Northern District of
New York

[Same title.]

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the District Court for the Northern District of New York in the above entitled proceeding as agreed upon by the parties, except that the following exhibits

admitted into evidence or marked for identification at the hearing in the above entitled proceeding are not printed in full herein:

Plaintiff's Exhibits 1-A to 1-O, inclusive.

Plaintiff's Exhibits 2-A to 2-O, inclusive.

Plaintiff's Exhibits 3-A and 3-B.

Plaintiff's Exhibits 5 and 14.

Defendants' Exhibits B, C, D, E, F, G, H, I, and J.

Dated: January —, 1942.

FRANCIS M. SHEA,

Assistant Attorney General.

RALPH L. EMMONS,

*United States Attorney for the
Northern District of New York.
Attorneys for Plaintiff-appellant.*

HOWARD A. SWARTWOOD,

WILLIAM H. PRITCHARD,
Attorneys for Defendants-Appellees.

Certification of Record

I, Glen A. Porter, Clerk of the District Court of the United States of America for the Northern District of New York, do hereby certify that the foregoing is a true transcript of the record of the said District Court in this action, as agreed on by the parties, and filed.

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed at the City of Utica in the Northern District, this — day of January, in the year of our Lord, One Thousand Nine Hundred and forty two, and of the Independence of the United States, the One Hundred Sixty-Sixth.

[SEAL]

_____, Clerk.

[fol. 298] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1941

(Argued March 23, 1942. Decided May 6, 1942)

No. 218

FRANCES PERKINS, Secretary of Labor of the United States,
Plaintiff-Appellant,

v.

ENDICOTT JOHNSON CORPORATION, a Corporation, and How-
ARD A. SWARTWOOD, Secretary, Endicott Johnson Corpora-
tion, Defendants-Appellees

Appeal by the Secretary of Labor from orders of the Dis-
trict Court for the Northern District of New York, refusing
to enforce two subpoenas *duces tecum* served by her on the
appellees pursuant to Section 5 of the Walsh-Healey Act,
41 U. S. C. A. 35.

This is an appeal by the Secretary of Labor from orders
of the District Court of the Northern District of New York,
refusing to enforce two subpoenas *duces tecum* served by
her on December 7, 1939, on the appellees Endicott Johnson
Corporation and Howard A. Swartwood, its Secretary. Be-
[fol. 299] tween 1936 and 1938, Endicott Johnson Corpora-
tion entered into fifteen contracts with the United States for
the manufacture of leather shoes, leather boots, gymnasium
shoes, and arctic overshoes. Each contract was for more
than \$10,000, and each contained the stipulations as to hours
and wages required by Section 1 of the Walsh-Healey Public
Contracts Act, 41 U. S. C. A. 35. Following the performance
of these contracts, and on the basis of an investigation by
representatives of the Department of Labor, the Secretary
of Labor issued a complaint, amended on November 16,
1939, which charged that Endicott Johnson had violated the
Act and breached certain of the contracts by failing to pay
the proscribed minimum wages and by working employees
in excess of the maximum hours without paying the pre-
scribed overtime. On December 7, 1939, the subpoenas
duces tecum involved were served on the appellees, requir-
ing the production by them of "all time cards, time books,
employees' wage statements and payroll records, showing

the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation" in twelve named factories and departments, during various periods between October 26, 1936 and October 11, 1938. On December 13, 1939, the day set by the Secretary for a hearing on her complaint and for the production of the subpoenaed records, the appellees refused to produce the records of eight of the twelve departments and factories on the ground that the persons employed therein were not covered by the Act¹ or the contracts. These persons worked in tanneries, sole-cutting, rubber, carton, and counter factories, which tanned most of the leather, [fol. 300] cut most of the leather soles, and manufactured all of the rubber heels, rubber soles, counters and cartons used by the company, but none of which were engaged in the assembly of these materials into the articles furnished to the government or in the packaging of those articles. The appellees did not refuse to produce the records of the other four factories, which it apparently admitted were covered by the Act and the contracts.

Following appellees' refusal to obey the subpoenas, the hearing was adjourned pending a court proceeding, under Section 5, 41 U. S. C. A. 39,² for enforcement of the sub-

¹ The Act applies to "all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract. Section 1(b)-(e), 41 U. S. C. A. 35(b)-(e).

² 41 U. S. C. A. 39. Sec. 5: "Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35 to 45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in sections 35-45 of this title the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court

poenas. On January 15, 1940, the present action was begun in the District Court, alleging that the Secretary "has reason to believe" that the persons employed in the eight plants in question were employed in performance of the contract. [fol. 301] The complaint and application also alleged that the records sought "are relevant, material and necessary" to determine whether the employees were paid the prescribed wages and overtime rates, and that "plaintiff desires to make such determinations in the same proceeding and on the basis of the same hearing in which the other matters in issue on the said amended complaint are determined, including the issue whether said persons were during the specified periods employed in the performance of said contracts." The appellees filed their answer on February 21, 1940. On June 26, 1940, the Secretary moved alternatively for judgment upon the pleadings, for summary judgment, or for an order enforcing the subpoenas. In an opinion dated February 1, 1941 (37 Fed. Supp. 604), the court below denied the motions for judgment on the pleadings and summary judgment, and withheld decision on the application for enforcement until after a hearing on the question of whether the eight plants were covered by the contracts. The Secretary then amended her complaint to allege, without qualification, that the employees were employed in the "manufacture and furnishing of the materials, supplies, articles and equipment used in the performance of the contracts with the United States," and renewed her motions for summary judgment and for judgment on the pleadings.

On April 24 and 25, 1941, an extensive hearing was held on Endicott Johnson's operations. On August 19, 1941,

of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

the District Court issued an opinion (40 Fed. Supp. 254) saying that the proof did not satisfy him that "the records sought are subject to inspection." He characterized some of the operations in the plants involved as "manufacture for stock," so that at the time of manufacture it could not be determined what material would subsequently be used in the articles furnished the government, and others [fol. 302] as tasks not "normally associated with the manufacture of shoes." A final order denying the Secretary's motions, and dismissing her complaint and application, was entered on October 27, 1941. From this order, and from the earlier denial of her motions, the Secretary of Labor brings this appeal.

Before Augustus N. Hand, Clark and Frank, Circuit Judges

Francis M. Shea, Assistant Attorney General, Ralph L. Emmons, United States Attorney (Sidney J. Kaplan, Special Assistant to the Attorney General, Melvin H. Siegel and Oscar H. Davis, Attorneys, Department of Justice, Of counsel), Attorneys for Plaintiff-Appellant.

Howard A. Swartwood and William H. Pritchard (John C. Bruton, Of counsel), Attorneys for Defendants-Appellees.

FRANK, Circuit Judge:

1. The subpoenas called for data bearing on possible violations of the contract stipulations with reference to the tanneries, rubber, sole-cutting, counter and carton plants. As the defendants do not assert that the subpoenas were too broad if the data sought was relevant,³ or that such data [fol. 303] was not relevant if those plants were covered by the contract, their sole objection was that the plants were not covered. We might dispose of the case on the ground that the testimony taken by the District Court amply proved the fact of coverage, as we are inclined to believe it did. But we have not gone into that matter and do not rest our decision on that ground, since we hold that the District

³ In other words, we have here no such subpoena as was involved in *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298; see *Cudahy Co. v. Fleming*, 122 F. (2d) 1005, 1009 (C. C. A. 8); *McMann v. S. E. C.*, 87 F. (2d) 377, 379 (C. C. A. 2).

Court should have enforced the subpoenas, on the pleadings, without taking any testimony whatever.

2. Defendants' contentions have as their background the principle (based on constitutional and related considerations) of opposition to efforts to pry into the affairs of citizens. But such a principle of government, like almost every other principle, is not an absolute; it cannot be isolationist, living a hermit-like life, but must adjust itself when it comes in contact with other principles.⁴ It is not a new judicial task to find a working compromise between the principle asserted by the defendants here and another governmental principle also deeply rooted in our legal history—that of avoiding undue complexity in, and prolongation of, litigation. ("To be effective, judicial administration must not be leaden-footed."⁵) The latter principle finds frequent expression in discouragement of interlocutory appeals. They are, generally, pariahs in the federal judicial system. The "final judgment rule" goes back to the early days of the Republic,⁶ and it has shown no signs of weakness in recent years. The policy behind the rule has been to discourage delays, to prevent the cluttering of appellate [fol. 304] dockets, and to permit the correction by the trial court itself of its own errors. These purposes have much in common, and it is not surprising that the "final judgment" rule has gone hand in hand with the doctrine of harmless error.⁷ As opposed to a judicial system where every technical slipup may be instantly appealed and will be automatically held to be fatal,⁸ ours is one in which correction is not ordinarily possible until the conclusion of the litigation, at which time only the seriously prejudicial defects will be dignified by appellate attention. The philos-

⁴ Cf. dissent in *Chrestensen v. Valentine*, 122 F. (2d) 511, 522, 525; rev'd 249 U. S. 47, 52 (April 13, 1942) and cases there cited. *Schenk v. U. S.*

⁵ *Cobbledick v. United States*, 309 U. S. 323, 325.

⁶ Crick, *The Final Judgment As a Basis for Appeal*, 41 Yale L. J. 539, 549-552 (1932).

⁷ See 28 U. S. C. A. 391; for history of this statutory provision see 3 Moore's *Federal Practice* (1938) pp. 3285-3289.

⁸ See *United States v. Forness*, 125 F. (2d) 928, 934ff.

ophy behind this practice is that many mistakes, apparently important at the time, will be seen to be trivial from the perspective of a final disposition of the case, and that disputes will therefore be more expeditiously settled. The principle is that of relatively speedy justice.

The accommodation of that principle to that on which defendants fundamentally rest their case is well illustrated in *Cogen v. United States*, 278 U. S. 221. There a defendant in a criminal prosecution after indictment but before trial, applied for a summary order requiring the district attorney to return papers which he alleged had been unconstitutionally taken from him without a warrant. The Supreme Court held that he could not appeal from an order denying his application. The court recognized that the result might be that the papers, unconstitutionally seized, would be unlawfully put in evidence in the criminal trial. But it concluded that, balancing that fact against the undesirability of interfering with the orderly progress of the trial, it was better to postpone appellate consideration of the question of wrongful seizure until, should the defendant be convicted, he appealed from the final judgment in the criminal suit. [fol. 305] A similar conclusion is reached where a witness is ordered to answer a question or to respond to a subpoena *duces tecum*—issued in a pending suit or in aid of a grand jury inquiry—asserting that compliance will deprive him of his constitutional rights; such an order is not ordinarily appealable. *Alexander v. United States*, 201 U. S. 117. In *Cobbledick v. United States*, 309 U. S. 323, 325-327, the court, dismissing an interlocutory appeal from an order refusing to quash a grand jury subpoena *duces tecum*, said: "The correctness of a trial court's rejection of even a constitutional claim, made by the accused in the process of prosecution, must await his conviction before its reconsideration by an appellate tribunal." The reason for such a conclusion, said the court, is the desire to "safeguard against undue interruption," to avoid "obstructing the orderly progress" of the main proceeding, to "protect from delay the progress" of that proceeding, to eliminate the "piecemeal disposition . . . of what for practical purposes is a single controversy . . .," thereby "enfeebling judicial administration."⁹

⁹ Where the lower court denies the government the use in a grand jury inquiry of papers alleged to have been im-

There are exceptions to these rules: (a) If a criminal suit is pending, but not against the person whose papers have been unlawfully seized, he is regarded as a "stranger" to the pending suit, and an action for the return of the papers is considered as "independent," so that from an order denying relief he may have an immediate appeal. *Go-Bart v. United States*, 282 U. S. 344; *Cheng Wai v. United States*, 125 F. (2d) 915 (C. C. A. 2, 1942) and cases [fol 306] there cited. (b) Also, if a person, whether a party or a "stranger," refuses to obey a court order directing him to produce papers or to testify, and is punished for contempt, he may then maintain an interlocutory appeal. *Alexander v. United States*, *supra*; *Union Tool Co. v. Wilson*, 259 U. S. 107, 110-111; *Cogen v. United States*, *supra*, at 224; *Cobbledick v. United States*, *supra*, at 327.

But it is essential to differentiate these two distinct questions: (a) immediate appealability and (b) the scope of the judicial inquiry in such cases. That, in some circumstances, an interlocutory appeal is allowed from an order directing a witness to respond to a subpoena, does not at all mean that the court, in an ancillary subpoena action, is at liberty to roam at large through all the issues in the main proceeding out of which the subpoena issues.

Thus, although an interlocutory appeal is entertained from an order punishing for contempt for failure to answer questions or produce books, in response to a subpoena *duces tecum*, before a grand jury, the witness cannot, either in the lower court or on appeal, attack the materiality of the information demanded, the jurisdiction of the grand jury or court over the subject matter of the inquiry, or the constitutionality of the statute. He is apparently limited to such "exceptional circumstances" as the possibility of self-incrimination, the existence of other special privileges, or the unreasonable breadth of the subpoena *duces tecum*. *Blair v. United States*, 250

properly seized, the government may have an interlocutory appeal. *Burdeau v. McDowell*, 265 U. S. 465. "In *Burdeau v. McDowell*, the action of the district court was, itself, an interruption of the grand jury's inquiry; appeal by the government did not halt the 'orderly progress' of the inquiry"; *Cobbledick v. United States*, *supra*, at 329 note 6.

U. S. 273.¹⁰ The reason for such strictness is not only the [fol. 307] historic repugnance to interlocutory interference, but also that there is a paramount "duty to disclose in a court all pertinent information within one's control" and that "the suppression of truth is a grievous necessity at best" which "can be justified at all only when the opposing private interest is supreme." L. Hand, J., in *McMann v. S. E. C.*, 87 F. (2d) 377, 378.

When we turn to the problem of interlocutory attacks on administrative rulings—which resemble interlocutory appeals from lower to upper courts—we find that the factors operative in the historic federal opposition to such intermediate appeals have, in general, been adopted and adapted, and that they have been reinforced by a recognition that administrative bodies have been created by Congress to give "expert" and expeditious attention to their specialized fields, so that there is a reluctance on the part of the courts to interfere until the administrative agencies have finished their work.^{10a} In spite of repeated efforts by respondents in administrative proceedings to induce the courts to interfere in the early stages of such proceedings, the Supreme Court, again and again, has ruled against premature attacks. Thus, federal courts will not entertain a suit by a respondent in an administrative proceeding to enjoin the proceeding on allegations that the administrative agency is without "jurisdiction" and that to allow the proceeding to continue in such circumstances will put the respondent to needless expense. *Myers v. Bethlehem Corp.*, 303 U. S. 41; *Newport News Co. v. Schauffler*, 303 U. S. 54; cf. *Fed. Power Comm. v. Edison Co.*, 304 U. S. 375; *Rochester Telephone*

¹⁰ In *Howat v. Kansas*, 258 U. S. 181, 186, it seems to have been intimated that the *Blair* case applies also to administrative proceedings; while there have been dicta (see note 34, below) that a "full inquiry" would be possible in a proceeding to enforce an administrative subpoena, we do not (for reasons presently to be noted) take such remarks as conclusive or as necessarily implying that the recusant witness could raise any issues he chose.

^{10a} Berger, *Exhaustion of Administrative Remedies*, 48 Yale L. J. (1939) 981.

Corp. v. United States, 307 U. S. 125, 129, 130; *United States v. Illinois Central R. R. Co.*, 244 U. S. 82.¹¹

[fol. 308] As above noted, there can be no interlocutory appeal from an order directing a person, not a "stranger," to testify or produce papers in a *judicial* proceeding, unless and until he refuses to obey the order and is punished for contempt. A different rule (stemming from historic roots) seemingly prevails where the order is to testify or produce papers in an *administrative* proceeding; there, seemingly, an interlocutory appeal may lie, prior to commitment for contempt. *Ellis v. I. C. C.*, 237 U. S. 484, 445 (1915); *Harriman v. I. C. C.*, 211 U. S. 407 (1908).¹² But as the appellants in those cases were "strangers" to the administrative proceeding—as noted in the *Ellis* case (237 U. S. at 445)—the rule applied in those cases is perhaps not out of line with the usual rule.¹³

In *Cobbledick v. United States*, 309 U. S. 323, 329-330, the court, in referring to those two cases, did not call attention to the fact that they involved "strangers." It is arguable, accordingly, that by silent implication their rationale was extended to include respondents as well as "strangers." However, as discussion of those two cases was not at all necessary to the decision in *Cobbledick* (since they were there mentioned only to distinguish them from the issue before the court, i.e., the propriety of an interlocutory appeal from an order refusing to quash a grand jury subpoena *duces tecum*), it would seem that that silent implication was, at most, dictum; we recall the warning of [fol. 309] Chief Justice Marshall, often repeated by the

¹¹ Cf. *Tank Car Corp. v. Terminal Co.*, 308 U. S. 422, 432-434.

¹² In both cases, appeals were allowed from orders entered upon the Commission's petitions under §12 of the Interstate Commerce Act, 49 U. S. C. A. 12, directing the individuals concerned to answer questions put to them in the course of proceedings before the Commission.

¹³ *Smith v. I. C. C.*, 245 U. S. 33, did not relate to a stranger; but the Commission there apparently raised no objection to the interlocutory appeal and the question of the propriety of the appeal was not mentioned by the court. See *Webster v. Fall*, 266 U. S. 507, 511; *Kvos v. Associated Press*, 299 U. S., 269, 279.

Supreme Court, that "asides" or marginalia in its opinions are not to be taken as authoritative.¹⁴ Nevertheless, we shall here assume *arguendo* that the *Ellis* and *Harriman* cases have been made applicable even to those who are not "strangers."

Even on that assumption, the only significant difference between the grand jury subpoena enforcement cases and a case like that at bar is that, in the former, no interlocutory appeal is allowed before the witness is committed for contempt for failure to comply with a court order to respond to the subpoena. Since the time when an interlocutory appeal may be taken by the witness has no bearing on the breadth of the judicial inquiry, the rule of *Blair v. United States*, *supra*, as to the restricted sweep of that inquiry, should, in substance, govern in the instant case. The fundamental resemblance between the grand jury and administrative investigatory proceedings has been heretofore observed by us and by the Ninth Circuit. *In re S. E. C.*, 84 F. (2d) 316, 318 (C. C. A. 2, 1936); *Woolley v. United States*, 97 F. (2d) 258, 262 (C. C. A. 9, 1938);¹⁵ *Consolidated Mines v. S. E. C.*, 97 F. (2d) 704, 708 (C. C. A. 9); *Cf. Note*, 86 U. of Pa. L. Rev. (1938) 420, 424.

Another parallel is found in cases where a court is asked to compel production of evidence before a commissioner appointed by another court in another jurisdiction to take testimony pursuant to a *dedimus*. The rule governing such a case has been well stated as follows: "It is not the duty of an auxiliary court or judge, within whose jurisdiction [fol. 310] testimony is being taken in a suit pending in the court of another district, to consider or determine the competency, materiality, or relevancy of the evidence which one of the parties seeks to elicit. It is the duty of such a court or judge to compel the production of the evidence, although the judge deems it incompetent or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence cannot possibly be compe-

¹⁴ *Cohens v. Virginia*, 6 Wheat. 264, 339; *Humphrey's Executor v. United States*, 295 U. S. 602, 627; *Myers v. United States*, 272 U. S. 52, 142, 143; *O'Donoghue v. United States*, 289 U. S. 546, 550; *Weyerhauser v. Hoyt*, 219 U. S. 380, 394; *Taylor v. Voss*, 271 U. S. 176, 185.

¹⁵ Citing *Blair v. United States*, *supra*.

tent, material or relevant, and that it would be an abuse of the process of the court to compel its production." *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 211, 215 (C. C. A. 8).¹⁶

As we said in *McMann v. S. E. C.*, *supra*, if an administrative investigation "be duly authorized, it is no more subject to obstruction than judicial proceedings."

3. However, in the *Ellis* and *Harriman* cases, *supra*, the court seemingly did inquire, more broadly, into the power of the administrative agency to conduct its hearings. But there are several important factors which convince us that those cases are not determinative of the issue which confronts us in the case at bar:

(a) The administrative hearing before the court in the *Harriman* case was not undertaken pursuant to a specific complaint of any violation of the Act, or upon a matter which might have been the object of such a complaint; it was solely a general investigation of railroad combinations and consolidation[s] to aid the Commission in making a report to Congress recommending future legislation. The court construed the statute, as it then stood, in such a way that the Commission lacked any power whatever to seek court aid to compel witnesses to answer questions in such a general investigation.¹⁷ When such a fundamental factor—a lack of all possible statutory authority to compel the witnesses to answer—is apparent on the very face of the record before the court, it should, of course, refuse to enforce the administrative subpoena.¹⁸ Under the court's

¹⁶ Still another parallel is *Sinclair Refining Co. v. Jenkins*, 289 U. S. 689, 697. There an action at law for damages for an infringement of a patent was at issue, but had not yet been tried. Plaintiff brought an ancillary bill for discovery of evidence relating to the extent of damages; the defendant objected that there had been as yet no determination in the main suit that the patent was valid and had been infringed. That objection was rejected by the Supreme Court which held that it was sufficient to show "good faith and probable cause."

¹⁷ Cf. *I. C. C. v. Goodrich Transit Co.*, 224 U. S. 194, 212.

¹⁸ We note, in passing, that in the *Harriman* case, there was, perhaps, an intimation that a statute conferring power on the Commission to summon witnesses by enforceable

interpretation of the statute before it, the *Harriman* case was likely *Cudahy Packing Company v. Holland*, — U. S. — (March 2, 1942) where, under the statute as construed by the court, the officer who signed the subpoena was a subordinate, wholly without authority to do so.¹⁹ There is nothing comparable in the case at bar.²⁰

subpoenas in a hearing in aid of a report to Congress might be unconstitutional. Any such doubt was set at rest in *Smith v. I. C. C.*, 245 U. S. 33, 44-45, after the statute was amended to broaden the Commission's powers to conduct such investigations. And see *Electric Bond & Share Co. v. S. E. C.*, 303 U. S. 419, 437-438; cf. *Bartlett Frazier Co. v. Hyde*, 65 F. (2d) 350 (C. C. A. 7), cert. den. 290 U. S. 654; *Fed. Trade Comm. v. Millers Nat. Fed.*, 47 E. (2d) 428 (App. D. C.).

¹⁹ Cf. *Jones v. S. E. C.*, 298 U. S. 1, discussed below.

²⁰ Here the powers of investigation and of the compulsion of testimony conferred upon the Secretary of Labor by section 5 of the Public Contracts Act are broader than those granted the Interstate Commerce Commission by sections 12 and 13 of its Act, as it stood at the time of the *Harriman* case. Section 5 of the Act before us here provides that "upon his own motion or on application of any person affected by any ruling . . . in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath." The Secretary is also authorized by section 5 "to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act. And section 4 empowers the Secretary "to make investigations and findings as herein provided, and [to] prosecute any inquiry necessary to his functions in any part of the United States." These provisions clearly contemplate investigations other than those in response to specific complaints of violation of the statute, such as investigations to determine prevailing wage or overtime rates, inquiries concerning the exceptions and

[fol. 312] There is no room today, we think, for differentiating actions to enforce administrative subpoenas in (a) administrative proceedings, authorized by statute, which are purely investigatory or which look merely to reports to Congress and (b) those contemplating final orders which will be judicially reviewable if adverse to the respondents therein. Were there still room for such a distinction, the instant case would come within the second category: If the final administrative order is adverse to defendants, it will render defendants liable for liquidated damages, and in a suit for recovery of the same, defendants will obtain judicial review. We need not consider the highly unlikely situation which would exist if no such suit were brought by the government or whether, in such event, defendants could bring suit for a declaratory judgment, thus procuring judicial review.^{20a}

[fol. 313] (b) The opinion in the *Ellis* case, so far as it relates to the scope of the judicial inquiry, is so cryptic as almost to defy analysis. A careful study of that opinion leads us to this conclusion: The issue whether a court should itself, before enforcing an administrative subpoena, go into the question of the existence of facts justifying the administrative agency in interrogating the witnesses, was not directly considered or decided by the Supreme Court. Consequently, as to that question, the *Ellis* case lacks precedential value. "Questions which merely lurk in the record,

modifications envisaged by section 6, and perhaps general investigations into the functioning of the Act.

As above noted, Congress increased the powers of the Interstate Commerce Commission after the *Harriman* decision, and the expansion was treated as valid by the Supreme Court; *Smith v. I. C. C.*, *supra*.

^{20a} A different problem might arise if the sole sanction of the Act were the "black-list" of section 3, since there might, under the rule of *Perkins v. Larkens Steel Co.*, 310 U. S. 113, be no way of reviewing the Secretary's action. But the Act contains provisions for both damages and a black-list. Judicial review of the former is possible, and if the findings upon which the claim for damages was based were reversed, we must assume that the Secretary would act lawfully and lift the black-list as to that contractor.

neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U. S. 507, 511; *Kvos v. Associated Press*, 299 U. S. 269, 279; cf. *Quong Wing v. Kirkendall*, 223 U. S. 59, 64.

(c) Almost three decades have elapsed since the *Ellis* case, and more than three since *Harriman*. We cannot blind ourselves to the obvious fact that, in that interval, the extension of administrative activities has increasingly brought to the attention of the Supreme Court the problems of the role of administrative bodies in our governmental setup, with a resultant evolution of a new judicial attitude as to their relation to the courts.²¹

(1) In the *Ellis* case (237 U. S. at 446) stress was laid on the impropriety of administrative inquiry into "private businesses." A recession from that attitude, manifested in *Smith v. I. C. C.*, 245 U. S. 33, 46,²² has latterly become pronounced. *Electric Bond & Share Co. v. S. E. C.*, 305 U. S. [fol. 314] 419, 437-438; cf. *Nebbia v. New York*, 291 U. S. 502; *Olsen v. Nebraska*, 313 U. S. 2, 36.²³

(2) Today (as distinguished from 1908 and 1915) the administrative and judicial processes are specifically said to be "collaborative." *United States v. Morgan*, 313 U. S. 409, 422; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 141-144.^{23a}

²¹ Cf. Chief Justice Taft's remarks, 257 U. S. XXV-XXVI.

²² Which distinguishes the *Ellis* case on the ground of a change in the statute.

²³ The records under subpoena in the instant case are not "private"; they are of exactly the same type which, as the defendants conceded at the oral argument, they have, since 1938, been exhibiting to agents of another division of the Department of Labor under the Fair Labor Standards Act. See 29 U. S. C. A. §211(c).

^{23a} That is not to say that courts do not perform many tasks which are fundamentally "administrative" such as corporate reorganizations, for instance—and should not, in such undertakings, have administrative assistance; cf. the advisory role of the S. E. C. under the Chandler Act.

The extensive use of administrative agencies is, in part, due to the failure of the courts to utilize experts more ex-

(3) The importance of promptness as well as adequacy in administrative investigations, necessarily involving prompt and effective use of the subpoena power, both of specific statutory violations and of the general administration of legislation, is more fully recognized by the courts today as an indispensable condition of the effective enforcement of remedial social legislation—as appears from a comparison, for instance, of the *Harriman* case with *Electric Bond & Share Co. v. S. E. C.*; *supra*. Cf. Miller, *A Judge* [fol. 315] *Looks at Judicial Review of Administrative Determinations*, 1 Pike and Fisher (Articles and Reports) 223, 231, 233.^{23b}

(4) Today stress is laid on the doctrines of "primary jurisdiction" and "administrative finality," discussed in the *Rochester Telephone Co.*; case *supra*, at 139-140; see, also, *Gray v. Powell*, 314 U. S. 402; *Inland Steel Co. v. United States*, 306 U. S. 153, 157; Moore & Adelson, *The Supreme Court: 1938 Term*, 26 Va. L. Rev. (1940) 697, 725-736, 754-758.

Such changes in the "climate of opinion"²⁴ (to use a tensively in connection with the judicial process. Over forty years ago, Judge Learned Hand pointed out that our courts had much to learn from the use in medieval England of juries of specialized experts; *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 45 (1901); see also his opinion in *Parke-Davis v. H. K. Mulford Co.*, 189 Fed. 95, 115 (1911).

The last word has doubtless not yet been said as to the interrelation of courts and experts. Cf. Beuscher, *The Use of Experts by the Courts*, 54 Harv. L. Rev. 1105 (1941), *supra*.

^{23b} Cf. Merriam, *The New Democracy and The New Despotism* (1939), 127 cf. 34-33; Douglas, *Democracy and Finance* (1940) 1-2, 243ff; McIlwain, *Constitutionalism Ancient and Modern*, Chapters I and VI and *Constitutionalism and The Changing World*, Chapters XI, XII and XIII; Woodrow Wilson, *The Study of Administration*, 2 Pol. Sc. Q. (1887) 197, and *Constitutional Government* (1908) 56-57.

²⁴ *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 391. Judge Learned Hand speaks of "the changing social tensions in every society" and "new schemata of adaptations" of which judges should be aware. *Sources of Tolerance*, 79 U. of Pa. L. Rev. (1930), 1, 12.

revived meteorological metaphor²⁵) should make us wary of now utilizing the latent and inarticulate major premise, which may be said to underlie such older cases as *Ellis* and *Harriman*, as a basis for current decisions of doctrines relative to judicial review, or preview, of the administrative de-[fol. 316] terminations.²⁶ We would stultify ourselves and unnecessarily burden the Supreme Court if—adhering to the dogma, obviously fictional to any reader of its history,²⁷ that alterations in that court's principles of decision never occur unless recorded in explicit statements that earlier de-

²⁵ The history of the metaphor is illuminating. It was, Lecky tells us, coined by Joseph Glanvill, an English 17th century sceptic who published a treatise, *The Vanity of Dogmatizing*, in which he analyzed the distorting influences and prejudices that corrode or pervert human judgments; he urged, as the first condition of knowledge, a total abnegation of opinions received through education. And yet, himself succumbing to the climate of opinion in which he lived, he later wrote a spirited defense of the belief in witchcraft!

Glanvill's contemporaries, Locke and Francis Bacon, described the same difficulties; they were anticipated by Roger Bacon in the 13th century. For similar discussions in our time, see, e.g., Calverton, *The Making of Man* (1931) 24-30; Ruth Benedict, *The Science of Custom*, in the same volume, 805; Cardozo, *The Nature of the Judicial Process* (1924) 276-278; Cardozo, *The Paradoxes of Legal Service* (1928) 127.

It is well to note that men living in the same time and place do not necessarily dwell in the same intellectual and emotional climate. Montaigne, in the 16th century, saw through witchcraft as did others in 17th century England. And what was Leonardi da Vinci's climate?

²⁶ As to the need of such wariness in "tax law," where fresh doctrinal breezes are blowing, see 1 Paul, *Federal Estate and Gift Taxation* (1942) 50, 394.

²⁷ See, e.g., Warren, *The Supreme Court in United States History* (2d ed. 1926); every chapter shows how, in each decade of its development, old doctrines have quietly been superseded by new. See also Sharpe, *Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions*, 46 Harv. L. Rev. (1933) 361, 593, 795.

cisions are over-ruled²³—we stubbornly and literally followed decisions which have been, but not too ostentatiously, modified. "The life of the law," as Mr. Justice Holmes said, "has been experience." Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application.²⁴ And

²³ See Brandeis, J., dissenting in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 404, 407-408 note 2: "Movement . . . takes place also without specific over-ruling or qualification of the earlier cases."

The fiction that all decisions, not expressly over-ruled, must somehow be reconciled, finds its analogy in the fiction of statutory "unity" encountered in Continental legal systems. See Wurzel, *Juridical Thinking* (in *The Science of Legal Method*, transl. 1921) 286, 359-367.

²⁴ "But, apart from the imminent risk of a failure to give any definition which would at once be perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the *gradual process of judicial inclusion and exclusion*, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Miller, J., in *Davidson v. New Orleans*, 96 U. S. 97, 104. Cf. the statement of Holmes, J., in *Noble State Bank v. Haskell*, 219 U. S. 104, 112, that "lines are pricked out by the gradual approach and contact of decisions on the opposing sides"; cf. *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 41.

"The court bows to the lesson of experience and the force of better reasoning, recognizing that the process of trial and error so fruitful in the physical sciences, is appropriate also in the judicial function." Brandeis, J., in *Burnet v. Coronado Oil & Gas Co.*, *supra*, at 407-408.

"The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law." Brandeis, J., dissenting in *Washington v. Dawson Co.*, 264 U. S. 219, 236.

[fol. 317] when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it.³⁰

Accordingly, so far as they concern the issue in the instant case, we shall treat the *Ellis* and *Harriman* cases as not controlling. It is true that they were recently cited in *Cobbledick*. But the reference was solely in respect of their rulings as to the time when an interlocutory appeal might be taken; the court had no occasion to and did not mention that aspect of those cases relating to the sole issue here—the breadth of the judicial inquiry, in a court action to compel a witness to comply with an administrative subpoena. That the *Cobbledick* case, by merely citing the *Ellis* and *Harriman* cases on the question of appealability, cannot be taken as reviving those cases with reference to that other issue—thus reinvigorating a doctrine not in accord with the more recent Supreme Court decisions, dealing more liberally with administrative agencies—is made clear by the fact that the opinion in *Cobbledick* was written by Mr. Justice Frankfurter who, four weeks later, wrote the opinion in *F. C. C. v. Pottsville Broadcasting Co.*, *supra*,³¹ and, subsequently, the opinion in *United States v. Morgan*, 313 U. S. 409.

4. In the light of such considerations, and because of the importance of the question, it is desirable to note, more in detail, why, in general, the policy against “undue interruption” should, if anything, apply even more forcibly to an administrative than to a judicial proceeding:

³⁰ To use mouth-filling words, cautious extrapolation is in order.

See *The Attitude of Lower Courts to Changing Precedents*, 50 Yale L. J. (1941) 1448.

No more than when courts generally are interpreting a statute should lower courts in interpreting Supreme Court decisions insist on excessive explicitness, saying, “We see what you are driving at, but you have not said it, and therefore we shall go on as before.” Cf. Mr. Justice Holmes in *Johnson v. United States*, 130 Fed. 30, 32.

³¹ See also his opinion, four weeks earlier, in *Helvering v. Hallock*, 309 U. S. 106, 119-122, as to *stare decisis*. Cf. Frankfurter, *Cardozo and Public Law*, 48 Yale L. J. (1939) 458, 476-478.

(a) As already suggested, one of the chief purposes of creating administrative agencies is to procure expedition. In *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 398, the Court spoke of "flexibility and dispatch" as "the salient virtues" of the administrative process; cf. *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 101. In *Gray v. Powell*, *supra*, reference was made to the "advantages of prompt and definite action" by administrative bodies. The courts, therefore, do not brook delays which would destroy those virtues and advantages.²² Had the defendants in the case at bar sought an injunction against the administrative proceeding, [fol. 319] they would have failed in their effort. Cf. *Federal Power Commission v. Edison Co.*, *supra*; *Myers v. Bethlehem Corp.*, *supra*; *Newport News Co. v. Schaufler*, *supra*. Yet if the trial court's position in the instant case were tenable, the same result could be accomplished by indirection: a respondent in an administrative hearing could refuse to respond to a subpoena and, in a suit in court to compel enforcement of the subpoena, the court could do what it is forbidden to do under *Blair v. United States*, suit. The doctrine of the *Bethlehem*, *Schauffler* and *Edison* cases would become frivolous and lack real substance; it would relate merely to one procedural device utilized by a respondent wishing to have the courts interfere with what the Supreme Court said, in those cases, was the "exclusive initial power" of the administrative officials to investigate and determine

²² John Foster Dulles, before the Attorney General's Committee on Administrative Procedure, said in 1940; "The great complaint which I hear about most of these administrative bodies is that they are *too legalistic*, not that they are not legalistic enough. What people want is 'quick, efficient action. You go to a skilled surgeon and he finds a diseased spot. He takes a knife and cuts it out with expertness, sureness of touch and a minimum of suffering. The body, relieved, goes on living. That is the kind of treatment which business and financial people, with whom I come in contact, expect of an administrative body. They do not want regulations which necessitate protracted and exhausting litigation. Yet if you compel these administrative bodies, in every move they take, to make a formal court record, if you plaster them with red tape, you are doing just that. You are going in the wrong direction."

their own jurisdiction. If defendants were to win here, they would have discovered a way of "running around the end" when blocked at the center.³³ We do not take so lightly those recent and as yet undisturbed Supreme Court decisions.

In the *Bethlehem* case, the court, in passing, said (p. 49) that, were the Board to apply to a court for enforcement of a subpoena, "to such an application appropriate defense may be made."³⁴ What the court meant by that statement [fol. 320] is clarified by a similar passing comment in *Federal Power Commission v. Edison Co.*, *supra* (p. 386), for there the court cited *Jones v. S. E. C.*, 298 U. S. 1: In the *Jones* case it was held that a citizen who filed a registration statement with the S. E. C., under the Securities Act, was like a plaintiff who had begun a law suit; that, consequently, he had an unconditional right to withdraw the registration statement (just as he could dismiss a law suit which he had instituted);³⁵ that, after he had withdrawn his registration, the proceedings begun by him before the S. E. C. terminated; and that a court was, thereafter without power to enforce a subpoena, issued by the S. E. C., relating to those proceedings which had thus properly been previously terminated by the citizen; with the withdrawal of the registration the proceeding was terminated and the investigation then "ceased to be legitimate." *In re S. E. C.*, 84 F. (2d) 316, 318 (C. C. A. 2). And so in the case at bar, there could be no enforcement of the subpoena if the administrative proceeding, had in some manner, been ended.

The defendants apparently impressed the lower court with the wisdom of its course because of the hardship and inconvenience to them of requiring the production of records which might later be found immaterial; the lower court said that a "predetermination" of the issue of coverage by it was "logical" from "a practical * * * angle," because of the "saving both in time and money," desirable in "these days

³³ Cf. *International Agricultural Corp. v. Pearce*, 113 F. (2d) 964 (C. C. A. 4).

³⁴ Cf. a similar dictum in *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160.

³⁵ Where securities are already outstanding, a different result has been reached; *Resources Internat'l v. S. E. C.*, 103 F. (2d) 929.

of stress, when the time of courts, government officials and manufacturers is at a premium."³⁶ That this view was not [fol. 321] "practical" is amply demonstrated by the record of delay in this case—one of two years and four months from the date when the subpoena suit was begun until it will terminate. We know that the trial judge is exceedingly conscientious (indeed his very conscientiousness led, we think, to his error in this case), and that unusual circumstances, occurring while this case was before him, put on him an exceptional burden of other judicial work. We deduct, therefore, the interval from the date when the suit was begun to February 1, 1941, when he entered his judgment refusing, on the pleadings, to enforce the subpoena.³⁷ But the time that elapsed thereafter resulted from his decision, on February 1, 1941, that there must be a trial of the facts as to plant coverage so that he could reach a conclusion with respect thereto. From that date until the time when our mandate is docketed, there will have been a delay of about one year and three months. Only after that period will the administrative hearing be resumed. One thinks of *Jarndyce v. Jarndyce*. Such Fabian methods can defeat administration.

(b) And here we come to another important reason why the policy against "undue interruption" applies peculiarly to most administrative proceedings in such a case as this: A court must not, when asked to enforce a subpoena, substitute its own for the administrative fact-finding. We have been told that it may not do so even after the administrative hearing has terminated in a final administrative decision. See, e.g., *Gray v. Powell*, 314 U. S. 402. And the reasons for such decisions are more emphatically present when the administrative proceedings, as here, are still interlocutory:

Because administrative officers, if not always themselves experts, are specialists, advised by experts, in a particular

³⁶ The same argument has been rejected in cases like *Cobbledick v. United States*, *supra*. Cf. *The President v. Skeen*, 118 F. (2d) 58, 59 (C. C. A. 5); *Petroleum Co. v. Commissioner*, 304 U. S. 209, 222 and the *Bethlehem* and *Shauffer* cases, *supra*.

³⁷ None of that delay is ascribable either to the judge or to counsel; a part of it was spent in an effort to settle the dispute.

[fol. 322] field of facts, inferences drawn by those officials from the data before them are to be given unusual weight by the courts. The Supreme Court has long ascribed to their findings "the strength due to the judgments of a tribunal appointed by law and informed by experience,"³⁸ and has said that "Congress entrusted the Board, not the courts, with power to draw inferences from the facts."³⁹ It is precisely in drawing such inferences that administrative specialized skill is of unique value. It is as if a judge were reviewing a physician's diagnosis.⁴⁰

Lawyers and judges should be the last to deny the value of a specialist's reactions, for our profession's position in society rests on the fact that we are specialists in our field. In truth, we lawyers sometimes make too much of a mystery of our methods, as did Coke when James I remarked that if "law was founded upon reason, he and others could reason as well as the judges," and Coke replied,⁴¹ in words which many lawyers delight to quote,⁴² that lawsuits "are not to be decided by natural reason, but by the artificial reason and [fol. 323] judgment of the law, which law is an art which requires long study and experience before that a man can at-

³⁸ *Illinois Central R. Co. v. I. C. C.*, 206 U. S. 441, 454 (1907); cf. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 148.

³⁹ *N. L. R. B. v. Link Belt Co.*, 311 U. S. 485, 597; cf. *Great Northern Ry. Co. v. Merchants Elev. Co.*, 259 U. S. 285, 291; *Tank Car Corp. v. Terminal Co.*, 308 U. S. 422, 433-434.

⁴⁰ Cf. Landis, *The Administrative Process* (1938) 152ff. See Dulles' comparison, above quoted, of administrative action with that of a "skilled surgeon" who acts with "expertness," and "sureness of touch."

⁴¹ Or so he says. There are those who doubt the authenticity of his report. It was written many years after the event, was published posthumously, and is contradicted in important respects by reports of others which were written when the events were still fresh. See Usher, *The Rise and Fall of the High Commission* (1913) 188-190; Usher, 18 *English Hist. Rev.* (1903) 664; Holdsworth, 5 *History of English Law* (1924) 430-431.

⁴² Cf. Pound, *The Spirit of The Common Law* (1921) 60-61.

tain to the cognizance of it."⁴³ The king, an intelligent amateur, was annoyed,⁴⁴ for doubtless he saw that, as McIlwain observes, "if . . . the law was to be supreme, and at the same time a mystery open only to the initiated, it is clear that, if the claim of the lawyers was to be admitted, the supreme authority would be their exclusive possession."⁴⁵ Coke doubtless went too far, as specialists often do in attaching too much inscrutable esotericism to their own techniques. Yet his attitude, within limits, was justified; what Pound has called "the trained intuition of the judge,"⁴⁶ [fol. 324] resulting from his experience and education, does give him, as to "questions of law," an edge over the layman.

⁴³ 12 Coke Rep. 65.

⁴⁴ As was Hobbes; *Leviathan* (1651) 139.

⁴⁵ McIlwain, *The High Court of Parliament*, 80-81; cf. Maitland, *Constitutional History of England*, 301.

⁴⁶ Pound, *The Theory of Judicial Decision*, 36 Harv. L. Rev. 940, 951 (1923).

For other references to the use of intuition by judges, see Cardozo, *The Growth of The Law*, 16-17; 66-67, 70; Cardozo, *The Paradoxes of Legal Science*, 60, 59, 286; Cardozo, *The Nature of The Judicial Process*, 9, 12, 26-30, 161-162, 167-168; Dickinson, *Administrative Justice and The Supremacy of Law*, 133-140, 149-150, 210 note, 358; L. Hand, J., in *Van Vranken v. Helvering*, 115 F. (2d) 709, 711; Wurzel, *loc. cit.* 287, 326, 364; Douglas, *Democracy and Finance*, Chapter XXIV; Hutcheson, *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions*, 14 Cornell L. Q. 274, 278.

Mr. Justice Holmes often commented on the intuitive factors in legal decisions. In *The Common Law* (1881) 1, he mentioned "intuitions of public policy" as one of the important factors in the making of legal rules. He coupled much the same statement with a reference to the need of "a special training" in *Vegelahn v. Guntner*, 167 Mass. 92 (1896). See also Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 465-467 (1897), reprinted in Shriver, Holmes, *Book Notices*, etc. (1936) 63; Holmes, *Book Notices*, 5 Am. L. Rev. 539 (1870) reprinted in Shriver, *supra*, 89, 90; Holmes, *Common Carriers and The Common Law*, 13 Am. L. Rev. 609 (1879) reprinted in Shriver, *supra*, 9, 10-11.

Awareness of that truth should induce the judge to recognize his inferiority to those who are specialists, possessed of trained intuition, in matters as to which he is less experienced. For the value of the specialist is that, in dealing with a selected area of experience, he is able to make inferences quickly—because in part intuitively—and with more likelihood of accuracy than his fellowmen, since many of the criteria of judgment have, with him, become semi-automatic, having been transferred, so to speak, from the conscious processes to the spinal column (or, to use high-brow terms, from the cerebral cortex to the cerebellum). He acquires unusual “insight” and “discernment” which is “the funded outcome of long familiarity with like operations in the past. Possession of this ability to seize what is . . . significant and to let the rest go is the mark of the expert, the connoisseur. . . . Long brooding over conditions, intimate contact associated with keen interest, thorough absorption in a multiplicity of allied experiences, tend to bring about those judgments which we then call intuitive; but they are true judgments because they are based on intelligent selection and estimation. . . .” Such intuitions, although seemingly “inspirational,” are not antirational, “as many scientists, inventors and other specialized thinkers have pointed out.” It was in that vein

“Dewey, *How We Think*, 104-105. Cf. Mason, *Briefing Practice of the N. L. R. B.*, 10 George Wash. L. Rev. (1942) 560, 579.

“Timberg, *Administrative Findings of Fact*, 27 Wash. U. L. Q. (1942) 169, 191-192; Aristotle, *Posterior Analytics*, Bk. II, Ch. 19, 100a, 100b, and *Nicomachean Ethics*, 1141a, 5.

“G. N. Lewis notes that much of the knowledge of the organic chemist “does not fully emerge into his scientific consciousness, and has been called the chemical instinct.” Leuba says of “scientific inspirations” that “they take place only after a period of conscious work and that they complete or *continue* something already begun.” The great chemist Kekule, in reporting two important discoveries as made by him “inspirationally,” said, “Let us learn to dream, gentlemen. Then, perhaps, we shall learn the truth . . . but let us beware publishing our dreams before they have been put to the proof of the waking understanding.” See also Wallas, *The Art of Thought*; Poincaré,

[fol. 325] that Mr. Justice Holmes, in a case in which a State Board's action was attacked, said that the Board's "action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express *an intuition of experience which outruns analysis* and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth." ⁵⁰

But, just as the non-lawyer can perceive gross errors in a judge's conclusions, so an administrative "diagnosis"—like that of a physician's—may be so wanting in any possible logic that judges can say that it lacks all cogency; ⁵¹ the lack of administrative cogency, however, must be fairly [fol. 326] gross before judges may reject the diagnosis; there is room for judicial review of administrative fact-finding, yet such judicial review, if it ignores the element of administrative "professionalism," ⁵² strikes at the very reason for having administrative hearings and findings. The

Science and Method, 56-63; 1 *The Life and Letters of Charles Darwin*, 84; Lowes, *The Road to Xanadu*, 61-63-432-433. Valery, *Variety*, 60; W. I. Thomas, in *The Unconscious, a Symposium*; Santayana, *Winds of Doctrine*, 84-89.

⁵⁰ *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 598; emphasis added.

He also said in the same case: "The Board was created for the purpose of using its judgment and its knowledge.

• • • Within its jurisdiction, except as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those rights to its protection and has trusted to its honor as it confides the protection of other social relations to the courts of law."

⁵¹ *Cf. N. L. R. B. v. Air Associates*, 121 F. (2d) 587, 592 where there was no evidence and no finding from which an inference could possibly be drawn that the discharge of employees (not known by the employer to be union members) in order to reinstate union employees, previously discharged, could conceivably discourage membership in a union, in violation of §8(3) of N. L. R. A.

⁵² *Cf. Merriam, loc. cit.*, 123ff.

intention of Congress was not to have the administrative official or agency "become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."⁵³

To put it differently, the capacity of judges to determine that the inferences of a jury—a body of amateurs fortuitously assembled—are not reasonably supported by the evidence is better than their capacity to reach a like conclusion as to the inferences of a specialized administrative agency. If we were to follow Judge Learned Hand's suggestion, made many years ago,⁵⁴ and borrow from medieval practice the use of juries of experts—especially if they brought in special or "fact" verdicts—the judges would be in much the same position relative to jury verdicts as they are with reference to the findings of administrative agencies.

That does not mean that many a judge, if he had specialized in the same fields and were assisted by the same staff of experts as an administrative agency, could not be just as expert; indeed, beginning with Judge Cooley's days in the Interstate Commerce Commission, many lawyers have served as competent members of such bodies.⁵⁵ But, as

⁵³ *United States v. Louisville & Nashville Ry. Co.*, 235 U. S. 314, 321; cf. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 304; *I. C. C. v. Illinois Central R. R. Co.*, 215 U. S. 452, 471.

⁵⁴ *Historical and Practical Considerations Regarding Expert Testimony*, *supra*.

⁵⁵ "Because the subject matters involved are often technical in nature—superintendence of transportation, or communications, of finance, or health—it is felt that only 'experts' or 'specialists' can effectively cope with them, and hence they have been segregated from other subject matters and entrusted to administrative agencies. Now, when reference is made to the 'expert administration agency,' it is surely not intended to mean that the necessary expertness is lodged in the head or heads of the agency or that they, in their own person, possess every expertise needed for the informed discharge of the manifold duties imposed upon the modern administrative organization. It is conceivable that the heads of agencies may be experts of sorts either by reason of the training they had previously had or by reason of the specialization in the agencies'

[fol. 327] Chief Judge Lehman has observed, "The judge is not presumed to have specialized training outside the law, and evidence which might be conclusive to the mind of a specialist might exercise no persuasive force upon the mind of a man not fitted by training to comprehend it. . . ." 56

In an admirably thoughtful recent official report, entitled *Administrative Adjudication in New York* (1942) 11-12, Benjamin, discussing the propriety of the use by administrative agencies of their "expert knowledge and experience in evaluating conclusions from the evidence in the record," says: "The advantages of specialized tribunals, technically [fol. 328] expert or experienced in a particular field of adjudication, will be partly lost, and desirable expedition will be sacrificed, if the tribunal does not use its experience and knowledge in this way." Cf. *I. C. C. v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 98; *People ex rel. Flanagan v. Board of Police Commissioners*, 93 N. Y. 97, 101. As

work after achieving their eminence; but it is scarcely conceivable that the heads could qualify as expert in the whole range of subjects—engineering, accounting, finance, law—involved in a determination by, say, the Federal Communications Commission. Reluctant as their friends may be to admit the fact, many agency heads are only experts *ex officio*. While it is with them that the responsibility for direction and supervision lies, we must look beyond the heads to find the talents which make the agency expert in its assigned tasks. This is a central reality. A pattern of administrative organization should not be created on the theory that the individuals who adjudicate are or can be the possessors of all the necessary *expertise* and understanding. If that theory were to prevail, the realization by an administrative agency of one of its chief *raison d'être* would be rendered almost impossible. . . . Wisdom in the complicated areas of modern governmental regulation is often necessarily the product of many minds, a synthesis of the understanding of many analysts. The administrative agency as now organized is a vehicle for bringing the judgments of numerous specially qualified officials to bear upon a single problem." Gellhorn, *Federal Administrative Proceedings* (1941) 27-29.

⁵⁶ *Technical Rules of Evidence*, 26 Col. L. Rev. (1926) 509, 511.

we said several years ago; "One of the principal reasons for the creation of such a body is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field." *Associated Gas & Electric Company v. S. E. C.*, 99 F. (2d) 595, 798 (C. C. A. 2, 1938).⁵⁷ The Supreme Court remarked just the other day: "To determine upon which side of the median line the particular instance falls, calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the court's duty to leave the Commission's judgment undisturbed"; *Gray v. Powell*, 314 U. S. 402, 413; cf. *Alton R. Co. v. United States*, — U. S. — (January 12, 1942); *Morgan, Stanley, Inc. v. S. E. C.*, — F. (2d) — (C. C. A. 2, February 20, 1942).

Moreover, the administrative officer may properly consider evidence which would be incompetent in a judicial trial and which a court in a preview hearing would disregard.⁵⁸

All this goes to show the impropriety of a court itself undertaking to find the facts before a full administrative [fol. 329] hearing has culminated in final administrative findings. For the court's findings, when uninformed by the administrator, may be materially different from those which the administrator would make. Consider, for instance, what the situation might have been if in *Gray v. Powell*, *supra*, a court, asked to enforce a subpoena in the early stages of that case, had tried to decide the very question of fact as to which the Supreme Court said the final administrative determination is markedly persuasive. And the refusal of the trial court in the instant case to enforce the subpoena would, if sustained by us, render it impossible for the administrator, after completion of the administrative hearing, to make the

⁵⁷ Cf. *United States Nav. Co. v. Cunard S. Co.*, 50 F. (2d) 83, 91 (C. C. A. 2, 1931).

⁵⁸ Cf. I Wigmore *Evidence* (3d ed. 1940) 32-43; *Internat'l Ass'n etc. v. N. L. R. B.*, 110 F. (2d) 29, 34 (affirmed 311 U. S. 72); Davis, *An Approach to Problems of Evidence in The Administrative Process*, 55 Harv. L. Rev. (1942) 364.

findings to which, the Supreme Court says, the courts must pay much heed.

Similar considerations served to answer the defendant's contention that the issue of plant-coverage in the instant case is "one of law to be determined by the court," at the threshold, because "it involves the construction of a statute."³⁹ Here again we have often been told to respect the attitudes of the experienced administrator, that administrative interpretations must be accorded considerable weight by the courts. *Gray v. Powell, supra*. In the case at bar, the court below, in interpreting the Act in the early stages of the administrative proceeding, did not have the benefit of the administrator's views as to the meaning of the Act as it related to the facts of the case.⁴⁰

[fol. 330] Defendants also urge that application of the Walsh-Healey Act to their tanneries, etc., would be improper because of an alleged prior inconsistent "ruling" made, as to a different company, by the Acting Administrator, and because of certain conduct thought to "estop" the government. Consideration of these issues has no place in such a proceeding as this; initially, the appropriate forum in which to raise them is the main proceeding.

5. Defendants assert that the coverage of the tanneries and other plants was a "jurisdictional fact," as to which the administrator had made no finding, and concerning which it was, therefore, necessary for the trial court to hear

³⁹ Of course, there was more before the court than the "construction" of the statute. There was also the issue of the "application" of the statute to the facts as they might later be found by the administrator (subject to being set aside in subsequent court proceedings, if not supported by substantial evidence).

⁴⁰ There is no need here to go into the question of how "construction" and "application" sometimes overlap, i.e., of how "construction" of a statute is, in part, a function of its "application." This is an old problem. Aristotle, *Posterior Analytics*, Bk. I, Ch. I. Cf. Dickinson, *Administrative Justice and The Supremacy of Law* (1927) 122; Berger, *loc. cit.*, at 1005; *Railroad Comm. v. Oil Co.*, 310 U. S. 573, 580.

evidence so that it could make a finding of fact on the subject. We reject that contention for several reasons:

(a) "Jurisdiction" and "jurisdictional" facts are mischievous words. They shed more darkness than light. Defendants in dwelling on "jurisdictional" facts, perhaps rely on *Crowell v. Benson*, 285 U. S. 221. Whether that decision still has its full vitality is not free from doubt;⁶¹ it seemingly has become limited to issues of fact on which the constitutional validity of the statute depends.⁶² There is no such issue here.

(b) The position of defendants boils down to this: Any fact is "jurisdictional"—and must therefore be the subject of a finding by the court in the subpoena suit—if its absence [fol. 331] would render erroneous a final administrative decision made at the conclusion of the administrative hearing. On that basis, the issue of what constitutes an unfair labor practice under the National Labor Relations Act would be "jurisdictional" in that sense—a conclusion which is surely erroneous.

(c) Even assuming, *arguendo*, that the fact of plant-coverage is "jurisdictional"—like the issue of interstate commerce in a Labor Board case—that issue is, *initially*, not for the courts but for the administrator.⁶³ It cannot, ordinarily, be considered by the courts unless and until the administrative agency, after fully hearing the evidence, has decided in favor of jurisdiction. *Myers v. Bethlehem Corp.*, *supra*; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, *supra*. In those cases the Supreme Court so held with respect to the National Labor Relations Board in

⁶¹ Cf. Note, 24 Va. L. Rev. 653 (1938).

⁶² *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 117, 184; cf. *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 257; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 144-146; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 400; see Moore and Adelson, *The Supreme Court: 1938 Term*, 26 Va. L. Rev. 697, 754-758 (1940); Stason, *Timing of Judicial Redress From Erroneous Administrative Action*, 25 Minn. L. Rev. (1940) 560; Larson, *The Doctrine of Constitutional Fact*, 15 Temp. U. L. Q. (1941) 185.

suits seeking to enjoin a hearing before that Board on the ground that it lacked jurisdiction.⁴³

As we have seen, an administrative proceeding might, on the face of the record, be so clearly without legal foundation that a court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding. Thus, if, in a National Labor Relations Board case, the Board's order or its pleadings in a suit to enforce its subpoena, affirmatively stated or admitted that the respondent employer was engaged in a business having no possible connection with interstate commerce, no court could properly order compliance with the subpoena. And the same result would follow if an administrative order for hearing under the Walsh-Healey Act, or the plaintiff's pleadings in the subpoena suit, explicitly stated (1) that the defendant was not a contractor with the government, or (2) that the contract did not contain the required statutory stipulations, or (3) that the contract was of a kind explicitly excluded by § 9, from the operations of the Act.⁴⁴ Admittedly there is no such affirmative defect here.

It is, of course, true that an administrative body should not begin a proceeding unless it has made a tentative determination that the data already before it is sufficient to

⁴³ The peculiar sanctity of "jurisdictional" issues, permitting them to be examined collaterally, has recently been much diminished. See *Stoll v. Gottlieb*, 305 U. S. 165; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66; *Chicot Drainage District v. Baxter State Bank*, 308 U. S. 371; *Jackson v. Irving Trust Co.*, 311 U. S. 494; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381. The newer doctrine applies to judicial but not to administrative determinations as to jurisdiction. But a similar rule applies, generally, to initial administrative determinations on that subject.

⁴⁴ *E.g.*, that it had been made by the Secretary of Agriculture for the purchase of agricultural commodities or related exclusively to carriage of freight or passengers by a railway line where published tariffs are in effect.

The court should also consider, *inter alia*, such matters as whether the subpoena is too broad and vague in its terms, or that it involves an encroachment on the privilege against self-incrimination.

justify the institution of such an inquiry. Since it is presumed that officials will act properly,⁶⁵ the very institution of an administrative proceeding might be said to imply that such a tentative determination has been made. Perhaps more is required; perhaps the administrative body should make some explicit statement to that effect. That we need not decide. Nor need we decide whether, if such a statement is required, precisely how explicit it should be. One court has intimated the impropriety of the use—in a published administrative order for hearing⁶⁶ of the phrase—[fol. 333] ology that the administrative agency has “reasonable cause to believe” the facts, to be considered at the conclusion of the hearing, as a warrant for ordering the hearing; the court suggested that that traditional locution—previously used for many years by the Federal Trade Commission without judicial reproof—was too vigorous because it unfairly indicated an administrative “pretrial” judgment.⁶⁷ Without at all concurring in that criticism, we cite it because it shows that the tentative determination of the administrative agency need not be too emphatically worded.⁶⁸ Certainly, in the case at bar, the preliminary administrative statement was more than sufficient: In the amended

⁶⁵ *United States v. Chemical Foundation*, 272 U. S. 1, 14-15; cf. *Philadelphia & Trenton R. R. v. Stimpson*, 14 Pet. 448, 458.

⁶⁶ The Federal Register Act, 44 U. S. C. A. 301, requires publication. The particularity with which the facts should be set out in such a published order or notice need not be considered here in detail. See Monograph, Attorney General's Committee on Administrative Procedure, Part 13 (S. E. C.), 77th Cong., 1st sess., Doc. No. 10, 44-54.

⁶⁷ *Bank of America Nat. Trust & Sav. Ass'n v. Douglas*, 105 F. (2d) 100, 105. For a critical comment on that decision, see Note 7 U. of Chi. L. Rev. (1939) 150; cf. comment in Part 13, Monograph of Attorney General's Committee, 46, 53.

⁶⁸ It would be enough, for instance, to say something like the following: “Having been informed by members of the staff of facts, which, if true, would justify a finding of violation, a hearing has been ordered to determine whether, etc.” Substantially that is the form now used by the S. E. C.

administrative complaint served on defendants, and in the amended pleadings in the case at bar, the plaintiff stated, in effect, that the plants were covered by the contract; this was surely more than was needed to warrant the institution of an administrative proceeding to determine whether the statutory stipulations in the contract had been violated as to those plants. The trial court should have accepted that preliminary determination which must, at that stage of the proceedings, be left to the administrative official or agency.⁶⁶

As we previously observed, the Supreme Court has said that, since courts and administrative officials are not identical but complementary, the courts are to be less strict [fol. 334] as to the procedures of administrators than are upper courts when dealing with lower courts. *Federal Communications Commission v. Pottsville Broadcasting Co.*, *supra*; *United States v. Morgan*, 307 U. S. 183, 190-191. It has also said, and often, that judges must not try to become super-administrators, substituting their judgments for those of the administrators.⁶⁷ Yet in the instant case, the court below was more exacting in its scrutiny of the administrator's conduct than, as an auxiliary court, it would have been of the conduct of another court. In effect, it tried the very issue of fact which Congress allotted to the administrator for trial.⁶⁸

6. Defendants make an argument which, so far as we can understand it, rests upon an erroneous postulate, even assuming that the fact of plant coverage is "jurisdictional." If, they say, an administrative subpoena seeks records which will aid the administrative agency in passing on the question of its own jurisdiction, then the subpoena should be enforced without a hearing on evidence as to the agency's jurisdiction; but, if the subpoena seeks data unrelated to

⁶⁶ Cf. the "primary jurisdiction" concept, discussed in *Island Steel Co. v. United States*, 306 U. S. 153, 157, 160 and cases there cited.

⁶⁷ See e. g., *Rochester Telephone Corp. v. United States*, *supra*; *Gray v. Powell*, *supra*; *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206, 208-209; *N. L. R. B. v. Link Belt Co.*, 311 U. S. 584, 597.

⁶⁸ Cf. *Labor Bd. v. Waterman S. S. Co.*, 309 U. S. 206, 208-209.

the issue of jurisdiction, then (defendants say) there must be such a court hearing as to the agency's jurisdiction. The basis for this argument seems to be as follows: The administrative agency, defendants seem to contend, must, as the very first step in the administrative proceeding, decide whether or not it has jurisdiction; if it decides that it has not, then the proceeding will end; but if it decides that it has jurisdiction, then, say the defendants, the respondent named in the administrative proceeding can promptly obtain [fol. 335] a court review of that decision, and the court in such a review will have the benefit of the administrative finding as to jurisdiction. It is argued, however, that if the administrative agency asks enforcement of a subpoena calling for data not bearing on its jurisdiction, then presumably the agency has already decided that it has jurisdiction, for otherwise (so the argument runs) it would not be justified in seeking evidence bearing on non-jurisdictional matters; accordingly (the defendants seem to urge), the court, when asked to enforce such a subpoena, has the benefit of the agency's express or implied finding that it has jurisdiction, and the court must proceed, therefore, to determine that issue before enforcing a subpoena which will have a bearing only on post-jurisdictional issues. The fallacy of the argument is that it assumes that there is a rule that the courts invariably will entertain an interlocutory review of an administrative agency's determination that it has jurisdiction before the agency has reached its final decision on the substantive issues of the proceeding. The rule, as we saw, is to the contrary. The defendants' contention would result in court control of the order of procedure in administrative proceedings; but the Supreme Court says that such bodies "should be free to fashion their own rules of procedure." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143.

7. Our decision is by no means unprecedented. In *Cudahy Packing Co. v. Fleming*, 122 F. (2d) 1005, 1009 (C. C. A. 8), it was held that a subpoena would lie for the production of records relating to employees in a plant which, it was asserted, was engaged entirely in intrastate commerce and therefore outside the jurisdiction of the administrator under the Fair Labor Standards Act; the decision was reversed by the Supreme Court, — U. S. — (March 9, 1942), [fol. 336] but solely on another ground not relevant here.

See also *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 354 (C. C. A. 8), cert. den. 311 U. S. 690; *The President v. Skeen*, 118 F. (2d) 58 (C. C. A. 8); cf. *United States v. Clyde*, 36 F. (2d) 691 (C. C. A. 2); *Goodyear Tire & Rubber Co. v. N. L. R. B.*, 122 F. (2d) 450, 453, is perhaps distinguishable from the case at bar; if it is not, we cannot accept its holding. The same is true of *Cudahy Packing Co. v. N. L. R. B.*, 117 F. (2d) 692, 694; and of *Fleming v. General Tobacco & Grocery Co.*, — F. (2d) — (C. C. A. 8, February 5, 1942). *N. L. R. B. v. New England Transportation*, 14 F. S. 497, is not in point, since the court was concerned with the act's constitutionality, not with the Board's "jurisdiction." *S. E. C. v. Tung Corp.*, 32 F. S. 371, imposed the requirements of "reasonable grounds to believe," which, as we have said, may be too strict a rule; if it can be said to have required even more, we cannot follow it.

8. Although the appeal was taken according to both the simplified procedure established by the Federal Rules of Civil Procedure and the former procedure, plaintiff has asked us to indicate which method is proper. We think that it would be sufficient to follow the simplified procedure of the Federal Rules, even though those Rules may not be fully applicable to the pre-appellate stages of this type of proceeding (*Goodyear Tire & Rubber Co. v. N. L. R. B.*, 122 F. (2d) 450), since it was plainly the intent of Rule 81 to extend the benefit of the streamlined appellate procedure, so far as appropriate, to such proceedings as these.

The order of the District Court is reversed and the case is remanded with directions to enforce the subpoenas.

[fol. 337] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of May one thousand nine hundred and forty-two.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

**FRANCES PERKINS, Secretary of Labor of the United States,
Plaintiff-Appellant,**

v.

**ENDICOTT JOHNSON CORPORATION, a Corporation, and
Howard A. Swartwood, Secretary, Endicott Johnson
Corporation, Defendants-Appellees**

**Appeal from the District Court of the United States for
the Northern District of New York**

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the case is remanded with directions to enforce the subpoenas.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 338] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Frances Perkins, Secretary of Labor, etc., v. Endicott Johnson Corp., etc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 22, 1942. D. E. Roberts, Clerk.

[fol. 339] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 340] SUPREME COURT OF THE UNITED STATES

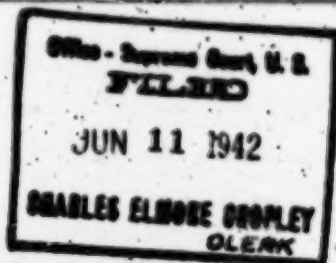
ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3046)

FILE COPY



IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

No. 142

ENDICOTT JOHNSON CORPORATION, a corporation,
and HOWARD A. SWARTWOOD, Secretary,
Endicott Johnson Corporation,

Petitioners,

against

FRANCES PERKINS, Secretary of Labor of the United
States,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT**

HOWARD A. SWARTWOOD,
WILLIAM H. PRITCHARD,
Attorneys for Petitioners.

JOHN C. BRUTON,
Of Counsel.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	2
Statement	3
Specification of Errors to be Urged.....	7
Reasons for Granting the Writ.....	8
Conclusion	20
Appendix	21

TABLE OF AUTHORITIES CITED

	PAGE
<i>Bradley Lumber Co. v. National Labor Relations Board</i> , 84 Fed. (2d) 97, 100 (C. C. A. Fifth, 1936), certiorari denied 299 U. S. 559.....	15
<i>Cudahy Packing Co. v. Fleming</i> , 122 Fed. (2d) 1005 (C. C. A. Eighth, 1941)	16
<i>Cudahy Packing Co. v. National Labor Relations Board</i> , 117 Fed. (2d) 692 (C. C. A. Tenth, 1941) ..	15
<i>E. I. duPont de Nemours & Co. v. Boland</i> , 85 Fed. (2d) 12 (C. C. A. Second, 1936).....	17
<i>Ellis v. Interstate Commerce Commission</i> , 237 U. S. 434 (1915)	12, 13
<i>Federal Power Commission v. Edison Co.</i> , 304 U. S. 375	12
<i>Federal Trade Commission v. Claire Furnace Co.</i> , 274 U. S. 160 (1927)	13
<i>Gates v. Graham Ice Cream Co.</i> , 31 Fed. Supp. 854..	17
<i>General Tobacco & Grocery Co. v. Fleming</i> , 125 Fed. (2d) 596 (C. C. A. Sixth, 1942)	15
<i>Goodyear Tire & Rubber Co. v. National Labor Relations Board</i> , 122 Fed. (2d) 450 (C. C. A. Sixth, 1941)	14

iii

	PAGE
<i>Harriman v. Interstate Commerce Commission</i> , 211	
U. S. 407 (1908)	11, 13
<i>Interstate Commerce Commission v. Brimson</i> , 154	
U. S. 447, 485 (1894)	9, 10, 13
<i>Jones v. Securities and Exchange Commission</i> , 298	
U. S. 1	12
<i>Myers v. Bethlehem Steel Corporation</i> , 303 U. S. 41.	12
<i>National Labor Relations Board v. New England Transportation Co.</i> , 14 Fed. Supp. 497	17
<i>Securities and Exchange Commission v. Tung Corporation</i> , 32 Fed. Supp. 371	17
 <i>Interstate Commerce Act</i> (26 Stat. 743)	10
<i>Walsh-Healey Public Contracts Act</i> (49 Stat. 2036) .	2, 21

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

No.

ENDICOTT JOHNSON CORPORATION, a corporation,
and HOWARD A. SWARTWOOD, Secretary,
Endicott Johnson Corporation,
Petitioners,

against

FRANCES PERKINS, Secretary of Labor of the
United States,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT**

Endicott Johnson Corporation and Howard A. Swartwood, Secretary, pray that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled case on May 22, 1942.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 298-332) is unreported as yet. Opinions of the United States District Court for the Northern District of New York (R. 55 and 278) are reported in 37 Fed. Supp. 604 and 40 Fed. Supp. 254, and orders thereon were entered February 19, 1941 and October 27, 1941.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Second Circuit sought to be reviewed was entered on May 22, 1942. Jurisdiction to issue the writ requested is found in the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The proceedings herein were instituted pursuant to the so-called Walsh-Healey Public Contracts Act (49 Stat. 2036, and hereinafter generally referred to as the Act), a full copy of which is printed as an appendix to this petition.

QUESTIONS PRESENTED

I. *Power*:—When an action is brought in a district court to enforce subpoenas *duces tecum* issued by an ad-

ministrative agency, does the district court have power to inquire into the coverage of the Act, when that is put in issue, or must it enforce the subpoenas merely on the allegation by the administrative agency that the Act applies?

II. *Coverage*:—The petitioner, Endicott Johnson Corporation, entered into contracts with the United States for the manufacture, in stated factories, of footwear; it also maintains separate and distinct plants for the tanning of leather, the manufacture of rubber heels, rubber soles, cut soles, counters and cartons. Are these latter plants subject to the Act, which relates solely to petitioner's contracts to manufacture footwear?

STATEMENT

Between 1936 and 1938 Endicott Johnson Corporation entered into fifteen contracts with the United States for the manufacture and sale of footwear (R. 2, 3, 12). These contracts were all for over \$10,000 and contained the stipulation or representation* concerning wages, hours of labor and working conditions called for by the Act (R. 172, 173). The Corporation was required to name, as to each contract, the factory where the footwear sold thereby was to be manufactured. The footwear factories, where the

*The entire stipulation or representation appears in Section 1 of the Act, pages 21 and 22, *infra*.

4

footwear called for by these contracts was manufactured, are located in Binghamton, N. Y. and Johnson City, N. Y. The Government Contracting Officer maintained an inspector in each of these factories for the inspection of materials and finished footwear. However, in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons no inspector was maintained and those plants were not named (R. 177). Further, the articles described by the specifications in the footwear contracts did not include articles produced in the defendant's tanneries, rubber mills and sole-cutting factories and counter and carton departments (R. 16, 17, 18).

After these contracts had all been performed, the Department of Labor commenced a proceeding against Endicott Johnson Corporation, claiming that in performing its contracts with the United States, it had not complied with the Act in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons. It was claimed that the Act applied to those plants and factories, as well as to the manufacture of footwear, even though the acting administrator of the Act had ruled, concurrently, in a similar situation, that the manufacture of articles to be used in the finished product was not part of the manufacture of the finished product (R. 50, 51, 52).

On December 7, 1939 the Department served in the proceeding the subpoenas *duces tecum* involved herein. These subpoenas called for the production of "all time cards, time

books, employees' wage statements and payroll records, showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation", in certain factories and departments during various periods between October 26, 1936 and October 11, 1938. The petitioners willingly furnished the information as to the footwear factories, but refused to produce the records as to the tanning of leather, etc. on the ground that those factories are not covered by the Act.

On January 15, 1940 an action to enforce the subpoenas, under Section 5 of the Act, was commenced in the District Court for the Northern District of New York. The complaint or application, by which this proceeding was begun, alleged that the Secretary "has reason to believe" that the Act covers the operations of the defendant corporation in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons (R. 5, Par. 9). In its answer the defendant corporation denied that the Act covered the factories and plants in question (R. 13, Par. Ninth). On June 26, 1940 the Secretary moved for a judgment upon the pleadings, for summary judgment, or for an order enforcing the subpoenas (R. 36). The motions for judgment on the pleadings and for summary judgment were denied and the District Court set the matter down for a hearing on the issue of whether the Act applies to the operations of the corporate defendant in the manufacture of leather, rubber

heels, rubber soles, cut soles, counters and cartons (R. 63-65).

The Secretary then amended her complaint to allege without qualification that the Act applies to the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons and renewed her motions for summary judgment and for judgment on the pleadings (R. 65-67). In April, 1941 a hearing was held before the District Court on the issue of the coverage of the Act. The District Court found that on the evidence on this issue the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons was not a part of the manufacture of footwear and that accordingly the Act does not apply to those operations of the corporate defendant (R. 278-284). On October 27, 1941 a final order was entered which denied the Secretary's motions and dismissed her complaint and application.

On appeal to the United States Circuit Court of Appeals for the Second Circuit it was held that these subpoenas *duces tecum* should be enforced on the pleadings. It was held that if the complaint contains an allegation of coverage, though it be denied, a hearing on that issue should not be held, as the District Court has no power to inquire into the coverage of the Act; that if it is alleged that the Act applies, the subpoenas *duces tecum* must be enforced without further question (R. 298-332).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the District Court must enforce the subpoenas *duces tecum* on the mere allegation in the complaint that the Secretary has reason to believe that the Act applies to the operations of the defendant in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons, even though such allegation be denied in the answer.

2. In holding that the District Court must enforce the subpoenas *duces tecum* on the allegation, though it be denied, that the Act applies to the operations of the defendant in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons.

3. In holding that a hearing should not be held to determine the applicability of the Act in a proceeding in the District Court brought to enforce subpoenas *duces tecum*, even though the applicability of the Act is in issue in the action.

4. In reversing the decrees of the District Court.

REASONS FOR GRANTING THE WRIT

As we show below, the opinion of the Circuit Court of Appeals decides a question of great public importance directly contrary to opinions of this Court and to opinions of other circuit courts of appeal.

(1) The Circuit Court of Appeals for the Second Circuit has decided a question of far-reaching public importance affecting procedure in all administrative tribunals and in United States District Courts. The Court has held that when an administrative agency commences a proceeding to enforce subpoenas *duces tecum*, the District Court has no power to inquire into the coverage of the Act, but must enforce these subpoenas willy nilly, upon the mere allegation of the administrative agency that the Act applies to the defendant.

If the Act does not apply to the defendant the administrative agency charged with its enforcement obviously has no jurisdiction under it. Accordingly, the decision of the Circuit Court means that the question of jurisdiction cannot be determined judicially when a proceeding is brought against the administrative defendant to compel it to produce records or witnesses in the administrative proceeding. Undoubtedly lack of jurisdiction or absence of coverage cannot be used as a sword to enjoin the proposed or pending proceeding but it certainly should be available as a

shield when judicial proceedings are brought against it to compel compliance with an administrative subpoena.

The subpoenaed material concededly was not directed to ascertain whether in fact those plants came under the Act. It was solely to determine damages on the assumption that the plants were covered by the Act.

If administrative subpoenas must be enforced by the Courts regardless of alleged lack of jurisdiction in the administrative agency issuing the subpoenas, there is no protection to the defendant against unreasonable search and seizure. If the Act does not apply, the administrative agency is acting without one scintilla of authority and since it is acting outside of the law it should not be permitted to call upon a federal court to give it aid by enforcing the subpoenas which it is empowered to issue, but not to enforce.

If Congress intended to make the enforcement of subpoenas an administrative act and not a judicial one, why does it provide for the enforcement of subpoenas in district courts? Certainly, if Congress intended that a mere allegation of the administrative agency that the Act applies to the defendant is sufficient for the enforcement of the subpoenas, it would have given that power to the administrative agency itself (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485 (1894) where the Court said that authority to enforce a subpoena "can only be asserted, under the law of the land, by a competent judi-

cial tribunal having jurisdiction in the premises."'). The requirement that subpoenas can only be enforced in a district court implies clearly that the enforcement of the subpoenas is intended to be a judicial act and therefore that the coverage of the Act which alone gives the agency jurisdiction, is to be judicially determined *in limine*. If it were otherwise Congress would have given the administrative agency authority to enforce its own subpoenas. Indeed, under the opinion of the Circuit Court of Appeals, Section 5 of the Act, and all other laws which impose the duty on courts to enforce administrative subpoenas, may well be unconstitutional as imposing a non-judicial function upon a court. *Interstate Commerce Commission v. Brimson*, *supra*.

(2) The opinion of the Circuit Court of Appeals for the Second Circuit does not comply with and in fact is directly contrary to opinions of this Court. The opinion does not refer to the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 (1894). However, the holding of this Court in that case is directly opposed to the holding of the Circuit Court of Appeals. There, the Interstate Commerce Commission petitioned the lower court for an order enforcing a subpoena pursuant to Section 12 of the Interstate Commerce Act, as amended (26 Stat. 743). The defendants contended, among other things, that the Act was unconstitutional in that it delegated legislative acts (enforcement of administrative subpoenas) to courts. The

contention was denied by this Court and it was held that the enforcement of such subpoenas is a judicial act. The Court said at 479:

"Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits."

Under that case, where it is claimed that the matter under investigation by the Commission is not authorized by the law, that issue must be determined by a court before the subpoenas are enforced.

In *Harriman v. Interstate Commerce Commission*, 211 U. S. 407 (1908) this Court held that certain questions asked a witness in a proceeding before the Interstate Com-

merce Commission were improper and need not be answered. In *Ellis v. Interstate Commerce Commission*, 237 U. S. 434 (1915) this Court again held that as to a company not subject to the jurisdiction of the Commission questions could be asked in a proceeding before that body only if they related to the issue of whether the Company was being used secretly as a device for evading Commission jurisdiction. In both cases, therefore, the Court passed upon the coverage of the Act, the jurisdiction of the Commission and the validity of evidence while the proceedings were pending before an administrative agency.

In *Jones v. Securities and Exchange Commission*, 298 U. S. 1, this Court held that the validity of proceedings before the Securities and Exchange Commission could be raised when the Commission sought to enforce subpoenas issued in that proceeding. In both *Myers v. Bethlehem Steel Corporation*, 303 U. S. 41 and *Federal Power Commission v. Edison Co.*, 304 U. S. 375, this Court stated, in effect, that if an administrative agency applied to a court for enforcement of a subpoena "appropriate defense may be made". The opinion of the Circuit Court of Appeals in the case at bar interprets these statements to mean only that "there could be no enforcement of the subpoena if the administrative proceeding had, in some manner, been ended" (R. 317). The Circuit Court has therefore very narrowly construed the language of this Court and held that "appropriate defense" means only that the administra-

tive proceeding has been ended. Such a confinement of this Court's language is not justified. It is directly contrary to the holdings of this Court in the *Ellis* and *Harri-*
man cases, *supra*.

Further, in *Interstate Commerce Commission v. Brim-*
son, *supra*, at page 485, this Court said:

"The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

See also *Federal Trade Commission v. Claire Furnace Co.*,
274 U. S. 160 (1927).

The justification which the Circuit Court used for departing from the holdings of this Court is that its decision is more in conformity with the "trend" of this Court's recent decisions concerning administrative bodies. The opinion says:

"Almost three decades have elapsed since the *Ellis* case, and more than three since *Harri-*
man. We cannot blind ourselves to the obvious fact that, in

that interval, the extension of administrative activities has increasingly brought to the attention of the Supreme Court the problems of the role of administrative bodies in our governmental setup, with a resultant evolution of a new judicial attitude as to their relation to the courts: * * * (R. 311).

And also—

“Such changes in the ‘climate of opinion’ (to use a revived meteorological metaphor) should make us wary of now utilizing the latent and inarticulate major premise, which may be said to underlie such older cases as *Ellis* and *Harriman*, as a basis for current decisions of doctrines relative to judicial review, or preview, of the administrative determinations.” (R. 312-313).

However, if there is to be any change in the opinion of this Court this Court itself should make such change, not the Circuit Court of Appeals. Furthermore, while there may have been a recent tendency in this Court to strengthen the fact findings and procedure in administrative agencies, the opinions of this Court have never changed fundamental principles of law such as are involved in the case at bar.

(3) The opinion of the Circuit Court of Appeals is directly contrary to recent opinions of other circuit courts. In *Goodyear Tire & Rubber Co. v. National Labor Relo-*

tions Board, 122 Fed. (2d) 450 (C. C. A. Sixth, 1941), *Cudahy Packing Co. v. National Labor Relations Board*, 117 Fed. (2d) 692 (C. C. A. Tenth, 1941) and *General Tobacco & Grocery Co. v. Fleming*, 125 Fed. (2d) 596 (C. C. A. Sixth, 1942), the Circuit Courts of Appeal held that before administrative subpoenas should be enforced the District Court must find whether the Act applied to the defendant and whether the Act is constitutional, if those points are put in issue by the answer. In the *General Tobacco & Grocery Co.* case, *supra*, the Court said, at page 599:

"An administrator must restrain himself within the bounds of his delegated authority. It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects."

In *Bradley Lumber Co. v. National Labor Relations Board*, 84 Fed. (2d) 97, 100 (C. C. A. Fifth, 1936) certiorari denied 299 U. S. 559, the Court said:

"The appellants can have a recognition of all their just rights under the scheme of procedure set up by

the act. Even in advance of a final order by the Board, jurisdiction can regularly be brought under judicial scrutiny, because no subpoena can be enforced nor any document or book be compelled to be produced, nor any other order enforced save by appeal to a court, which would then and there refuse to sanction or aid any clear usurpation."

In *Cudahy Packing Co. v. Fleming*, 122 Fed. (2d) 1005 (C. C. A. Eighth, 1941) it was held that a subpoena should be enforced which called for records of a plant engaged solely in intrastate commerce. In this case, however, it appeared that the defendant also had a plant engaged principally in interstate commerce and it was contended by the administrative agency that some of the employees in the plant engaged solely in intrastate commerce were concerned with the goods manufactured in the interstate commerce plant. In other words, there was a mixture of employees and the administrative agency could not decide which employees came within its jurisdiction and which did not, without the records of both plants. The opinion of the Court contains no language which would indicate that the subpoena should be enforced wholly apart from, and without consideration to, the applicability of the statute.

Accordingly, the opinion of the Circuit Court of Appeals in the case at bar is entirely without precedent and

is directly contrary to the holdings of the other Circuit Courts of Appeal.*

(4) The opinion of the Circuit Court of Appeals provides a rule of law in the Second Circuit which is contrary to its own prior opinion in *E. I. duPont de Nemours & Co. v. Boland*, 85 Fed. (2d) 12 (C. C. A. Second, 1936). In that case the Court said:

"Appellants' right to contest the examination of records or the compulsion of testimony may be asserted when application is made to enforce a subpoena. *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160, 47 S. Ct. 553, 71 L. Ed. 978; *Federal Trade Commission v. Maynard Coal Co.*, 57 App. D. C. 297, 22 F. (2d) 873" (p. 15).

The opinion of the Circuit Court in the case at bar will reduce district courts to mere automatons whenever they are requested to enforce a subpoena issued by an administrative agency. Under this decision, which it is sought to have reviewed, the district courts can only inquire, if it is put in issue, whether the administrative proceedings are

*There are several opinions of the district courts which are contrary to the decision of the Circuit Court of Appeals in the instant case. These opinions include *National Labor Relations Board v. New England Transportation Co.*, 14 Fed. Supp. 497, *Securities and Exchange Commission v. Tung Corporation*, 32 Fed. Supp. 371, *Gates v. Graham Ice Cream Co.*, 31 Fed. Supp. 854.

still pending. If the administrative proceedings are pending the District Court must enforce the subpoena merely on the complaint or allegation of the administrative agency. The administrative agency would, of course, not allege that the administrative proceeding has ended nor would it allege that the act under which the proceedings are brought is unconstitutional or anything else which would or might prejudice the administrative agency.* The answer will assert any defense to the enforcement of the subpoenas available to the administrative defendant. Unless the answer

*The opinion of the Circuit Court says:

"As we have seen, an administrative proceeding might, on the face of the record, be so clearly without legal foundation that a court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding. Thus, if, in a National Labor Relations Board case, the Board's order or its pleadings in a suit to enforce its subpoena, affirmatively stated or admitted that the respondent employer was engaged in a business having no possible connection with interstate commerce, no court could properly order compliance with the subpoena. And the same result would follow if an administrative order for hearing under the Walsh-Healey Act, or the plaintiff's pleadings in the subpoena suit, explicitly stated (1) that the defendant was not a contractor with the government, or (2) that the contract did not contain the required statutory stipulations, or (3) that the contract was of a kind explicitly excluded by §9, from the operations of the Act." (R. 328).

It is unthinkable, of course, that a complaint would contain such a statement or admission.

asserts that the administrative proceeding is ended, under the opinion of the Circuit Court of Appeals the District Court has no power to hold a hearing or to inquire into the issues raised by the pleadings. This is contrary to judicial practice and to our judicial system. A proceeding in the District Court to enforce a subpoena is an entirely independent case. If the Court has no power to hold a hearing on the issues tendered by the pleadings, the case loses its status as a judicial cause and makes a mockery of the Court and of the entire proceeding.

(5) The Circuit Court of Appeals acted arbitrarily and entirely without authority in reversing the District Court. The evidence before the District Court showed conclusively (in fact there was no contrary evidence) that the leather, rubber heels, rubber soles, cut soles, counters and cartons were not made for government use and were selected at the completion of their manufacture. The Department of Labor has itself ruled that where material is made for stock and not for the performance of government contracts it is not covered by the Act. The Circuit Court of Appeals, therefore, acted arbitrarily in reversing the opinion of the District Court in holding that the plants in question of the corporate defendant are not covered by the Act.

CONCLUSION

Because of the importance of the questions presented and because of the failure of the Circuit Court of Appeals for the Second Circuit to give proper effect to the applicable decisions of this Court and for the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD A. SWARTWOOD,
WILLIAM H. PRITCHARD,
Attorneys for Petitioners.

JOHN C. BRUTON,
Of Counsel.

June, 1942.

APPENDIX

[PUBLIC—No. 846—74TH CONGRESS]
[S. 3055]

AN ACT

To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equip-

ment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor, will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of \$10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of

money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such

other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United

States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be at least one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making

appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes" approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for other purposes", approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the re-

mainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Approved, June 30, 1936.

FILE COPY

Office - Supreme Court, U. S.

FILED

OCT 27 1942

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 142

ENDICOTT JOHNSON CORPORATION, a corporation, and HOWARD A. SWARTWOOD, Secretary, Endicott Johnson Corporation,

Petitioners,

against

FRANCES PERKINS, Secretary of Labor of the United States,

Respondent.

BRIEF FOR PETITIONERS

✓ **HOWARD A. SWARTWOOD,**
✓ **WILLIAM H. PRITCHARD,**
Attorneys for Petitioners.

✓ **EDWARD H. GREEN,**
✓ **JOHN C. BRUTON,**
Of Counsel.

October, 1942.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	2
Statement	3
Specification of Errors	7
Summary of Argument	7
Argument	9
I. Congress Intended That a District Court Should Determine the Issue of Jurisdiction Before En- forcement of an Administrative Subpoena....	9
II. Denial to the District Court of Power to Deter- mine Jurisdiction on the Application to Enforce an Administrative Subpoena <i>Duces Tecum</i> Violates the Fourth Amendment to the Consti- tution	22
III. The Construction of the Act by the Circuit Court of Appeals as to the Powers of the District Court Violates Article III of the Constitution	27
IV. The Arguments Advanced by the Circuit Court of Appeals to Support its Conclusion, not Previ- ously Dealt with in this Brief, are Unsound...	30
V. The Act does not Apply to the Manufacture of Leather, Rubber Goods, Counters and Cartons under Contracts for the Sale of Shoes.....	38
VI. Conclusion	48
Appendix	49

TABLE OF CASES CITED

	PAGE
<i>Alexander v. United States</i> , 201 U. S. 117 (1906) . . .	31
<i>Anderson v. Dunn</i> , 6 Wheat. 204 (1821)	17
<i>Boyd v. United States</i> , 116 U. S. 616 (1886)	22
<i>Bradley Lumber Co. v. National Relations Board</i> , 84 F. (2d) 97, 100 (C. C. A. 5th, 1936), certiorari denied 299 U. S. 559 (1937)	13
<i>Brewster v. Gage</i> , 280 U. S. 327 (1930)	41
<i>Cobbledick v. United States</i> , 309 U. S. 323 (1940) . .	31
<i>Cogen v. United States</i> , 278 U. S. 221 (1929)	30
<i>Commissioner v. Havemeyer</i> , 296 U. S. 506 (1936) . .	29
<i>Cudahy Packing Co. v. Fleming</i> , 122 F. (2d) 1005 (C. C. A. 8th, 1941)	14
<i>Cudahy Packing Company v. Holland</i> , 315 U. S. 357 (1942)	17, 25
<i>Cudahy Packing Co. v. National Labor Relations Board</i> , 117 F. (2d) 692 (C. C. A. 10th, 1941)	12
<i>E. I. Dupont de Nemours & Co. v. Boland</i> , 85 F. (2d) 12, 15 (C. C. A. 2d, 1936)	13
<i>Electric Vehicle Co., et al. v. Craig Toledo Motor Co., et al.</i> , 157 Fed. 316 (1907)	16
<i>Ellis v. Interstate Commerce Commission</i> , 237 U. S. 434 (1915)	11, 12
<i>Federal Power Commission v. Metropolitan Edison Co.</i> , 304 U. S. 375 (1938)	11
<i>Federal Trade Commission v. American Tobacco Company</i> , 264 U. S. 298 (1924)	22

<i>Federal Trade Commission v. Bunte Brothers, Inc.</i> , 312 U. S. 349 (1941)	41
<i>Fleming v. Montgomery Ward & Co.</i> , 114 F. (2d) 384 (C. C. A. 7th, 1940), certiorari denied 311 U. S. 690	14
<i>Gates v. Graham Ice Cream Co.</i> , 31 Fed. Supp. 854 (1940)	12
<i>General Tobacco & Grocery Co. v. Fleming</i> , 125 F. (2d) 596 (C. C. A. 6th, 1942)	12
<i>Goodyear Tire & Rubber Co. v. National Labor Rela- tions Board</i> , 122 F. (2d) 450 (C. C. A. 6th, 1941)	12
<i>Gray v. Powell</i> , 314 U. S. 402 (1941)	36
<i>Hale v. Henkel</i> , 201 U. S. 43 (1906)	22, 26
<i>Harriman v. Interstate Commerce Commission</i> , 211 U. S. 407 (1908)	11, 12
<i>In re Chapman</i> , 166 U. S. 661 (1897)	17
<i>In re Pacific Ry. Com'n.</i> , 32 Fed. 241 (C. C., N. D. Cal., 1887)	22
<i>Interstate Commerce Commission v. Brinson</i> , 154 U. S. 447 (1894)	9, 12, 16, 22, 29, 30
<i>Interstate Commerce Commission v. Illinois Central Railroad Company</i> , 215 U. S. 452 (1910)	17
<i>Jones v. Securities & Exchange Commission</i> , 298 U. S. 1 (1936)	11, 12, 22, 35
<i>Jurney v. MacCracken</i> , 294 U. S. 125 (1935)	17
<i>Keller v. Potomac Electric Co.</i> , 261 U. S. 428 (1923)	27
<i>Kilbourn v. Thompson</i> , 103 U. S. 168 (1880)	17
<i>Liberty Warehouse Co. v. Grannis</i> , 273 U. S. 70	18, 28
<i>McGrain v. Daugherty</i> , 273 U. S. 135 (1927)	17
<i>MacLuer v. Hudspeth</i> , 115 F. (2d) 114 (C. C. A. 10th, 1940)	38

	PAGE
<i>Muskrat v. U. S.</i> , 219 U. S. 346 (1911).....	28
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U. S. 41 (1938)	11
<i>National Labor Relations Board v. New England Transp. Co.</i> , 14 Fed. Supp. 497 (1936).....	12
<i>National Relations Board v. Jones & Laughlin Steel Corp.</i> , 301 U. S. 1 (1936).....	22
<i>Olmstead v. United States</i> , 277 U. S. 438 (1928)....	24
<i>Perlman v. United States</i> , 247 U. S. 7 (1918), as ex- plained in <i>Cobbledick v. United States</i>	31
<i>Rubel v. Beaver Falls Cutlery Co.</i> , 22 Fed. 282 (1884).....	16
<i>Schuricht v. McNutt v. Willis</i> , 26 F. (2d) 388 (1928).....	16
<i>Securities and Exchange Commission v. Tung Corpo- ration</i> , 32 Fed. Supp. 371 (1940).....	12
<i>Silver King Coalition Mines Co. v. Silver King Con- solidated Mining Co.</i> , 204 Fed. 166 (C. C. A. 8th (1913)), cert. den. 229 U. S. 624.....	38
<i>Skinner v. Oklahoma</i> , U. S. (86 L. Ed. 1130) (1942)	23
<i>Sinclair v. United States</i> , 279 U. S. 263 (1929)....	17, 25
<i>United States v. American Bell Telephone Co. and others</i> , 29 Fed. 17 (1886)	16
<i>United States v. American Trucking Association</i> , 310 U. S. 534 (1940).....	41
<i>United States v. Jackson</i> , 280 U. S. 183 (1930).....	41
<i>United States v. Still</i> , 120 F. (2d) 876 (C. C. A. 4th, 1941)	38
<i>United States v. 1013 Crates, etc.</i> , 52 F. (2d) 49, 51 (C. C. A. 2nd, 1931)	24
<i>Warren v. Keep</i> , 155 U. S. 265 (1894).....	38

TABLE OF STATUTES CITED

	PAGE
Bituminous Coal Act of 1937, 50 Stat. 86, 15 U. S. C. § 838	15
Civil Aeronautics Act of 1938, 52 Stat. 1021, 49 U. S. C. § 644(c)	15
Communications Act, 48 Stat. 1096, 47 U. S. C. § 409(c), (d)	15
Constitution of the United States, Article I, Sec. 8, Clause 17	27
Article III	8, 18, 21, 27, 29, 30, 32, 33, 34
Fourth Amendment	8, 21, 22, 23, 25, 26, 30, 31, 32, 34
Fair Labor Standards Act, 52 Stat. 1065, 29 U. S. C. § 209, adopting the provisions of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. §§ 49, 50.	15
Federal Power Act, 49 Stat. 857, 16 U. S. C. § 825f(c)	15
Federal Rules of Civil Procedure, § 45(d)	16
Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. §§ 49, 50	15
Interstate Commerce Act, as amended, Section 12 (26 Stat.) 743	10
Interstate Commerce Commission Act, 25 Stat. 859, 49 U. S. C. § 12(3)	15
Judicial Code, Section 240(a) as amended by the Act of February 13, 1925	2
Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1438, 33 U. S. C. § 927(b)	15
Merchant Marine Act, 49 Stat. 1991, 46 U. S. C. § 1124(b)	15
Motor Carrier Act, 49 Stat. 550, 49 U. S. C. § 305(d), incorporating provisions of the Intersate Commerce Act, 25 Stat. 859, 49 U. S. C. § 12(3)	15

	PAGE
National Industrial Recovery Act.....	42
National Labor Relations Act, 49 Stat. 456, 29 U. S. C. §161(2)	15
Packers and Stockyards Act, 42 Stat. 168, 7 U. S. C. § 222, adopting the provisions of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. §§ 49, 50	15
Public Utility Holding Company Act, 49 Stat. 831, 15 U. S. C. § 79r(c)	15
Railroad Unemployment Insurance Act, 52 Stat. 1107, as amended, 45 U. S. C. § 362(b)	15
Securities Act of 1933, 48 Stat. 87, 15 U. S. C. § 77t(c)	15
Securities Exchange Act of 1934, 48 Stat. 900, 15 U. S. C. § 78u(c)	15
Veterans Administration Act, 49 Stat. 2033, 38 U. S. C. § 133	15
Walsh-Healey Public Contracts Act (49 Stat. 2036) .2, 44	

TABLE OF AUTHORITIES CITED

Eberling, "Congressional Investigations" (1928).....	15
Report of the United States Attorney General's Com- mittee on Administrative Procedure (1941)	15, 23
Rules of Federal Procedure, Rule 52.....	38
"Rulings and Interpretations No. 2", issued Septem- ber 29, 1939	41
von Bauer, Federal Administrative Law, Vol. 1, page 65	17

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

No. 142

ENDICOTT JOHNSON CORPORATION, a corporation, and HOWARD A. SWARTWOOD,
Secretary; Endicott Johnson Corporation,
Petitioners,

against

FRANCES PERKINS, Secretary of Labor of
the United States,
Respondent.

BRIEF FOR PETITIONERS

The case is here on certiorari to review a decision and decree of the United States Circuit Court of Appeals for the Second Circuit entered May 22, 1942, reversing orders of the District Court for the Northern District of New York entered February 19, 1941 and October 27, 1941, respectively (R. 63, 283).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 298-332) is reported at 128 F. (2d)

208. Opinions of the District Court (R. 55 and 278) are reported in 37 Fed. Supp. 604 and 40 Fed. Supp. 254.

JURISDICTION

Jurisdiction of this Court is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. A writ of certiorari was granted herein on October 12, 1942.

STATUTE INVOLVED

The proceedings were instituted pursuant to the so-called Walsh-Healey Public Contracts Act (49 Stat. 2036, and hereinafter generally referred to as the Act), a full copy of which is printed as an appendix to this brief.

QUESTIONS PRESENTED

I. *Power*.—When an action is brought in a district court to enforce subpoenas *duces tecum* issued by an administrative agency, calling for documents entirely unrelated to the coverage of the Act, does the district court have power to inquire into the coverage of the Act, when that is put in issue, or must it enforce the subpoenas merely on the allegation by the administrative agency that the Act applies?

II. *Coverage*.—The petitioner, Endicott Johnson Corporation, entered into contracts with the United States for the manufacture, in stated factories, of shoes; it also maintains separate and distinct factories and plants for the tanning of leather, the manufacture of rubber heels, rubber soles, cut soles, counters and cartons. Are these latter factories and plants subject to the Act which relates solely to petitioner's contracts to manufacture shoes in the specified shoe factories?

STATEMENT

Endicott Johnson Corporation, the corporate petitioner, is a manufacturer of footwear; a manufacturer of leather; a manufacturer of rubber heels and soles; a manufacturer of cut leather soles, including outer soles, middle soles and inner soles; a manufacturer of counters and a manufacturer of cartons. Its plants are located at Binghamton, Johnson City, Endicott and Owego, New York (R. 14). They consist of numerous and separate shoe factories, numerous and separate tanneries and rubber mills and separate and distinct plants for the manufacture of cut soles, counters and cartons (R. 14).

Endicott Johnson Corporation's shoe factories are located in all four towns and it manufactures and sells shoes primarily for civilian use. Its tanneries are all located at Endicott; most of the leather manufactured in these tanneries is used by it in the manufacture of shoes but some of it is used for other purposes and some is sold. Its rubber mills for the manufacture of rubber heels and soles are all located at Johnson City; most of these rubber heels and soles are used by it in the manufacture of shoes but some of them are sold. These rubber mills also manufacture golf balls and rubber for footwear. Its sole cutting plants are located at Johnson City and Endicott. It has counter plants at Johnson City and it has carton plants at both Johnson City and Endicott (R. 14).

Between 1936 and 1938 Endicott Johnson Corporation entered into fifteen contracts with the United States. By stipulation (R. 294) the portion of one contract only is printed as a part of the Record. This contract, typical of all the contracts, provides that it is:

"For 133,524 pairs Shoes, Service; Special Type 'B' with Full Middle sole and Rubber Heel; 182,256 pairs Shoes, Service, Special Type 'B,' with Corded Rubber Sole and Uncorded Rubber Heel.

"To be manufactured at or supplied from Geo. F. Tabernacle, Binghamton, N. Y." (Ex. 2b, R. 178).

The other fourteen contracts were also for the sale of shoes and each of the fifteen contracts was for over \$10,000 and contained the stipulation or representation* concerning wages, hours of labor and working conditions called for by the Act (R. 172, 173). The Corporation was required to name, in each contract, the factory where the shoes covered thereby were to be manufactured. The shoe factories, where the shoes called for by these contracts were manufactured, are located in Binghamton and Johnson City. The Government Contracting Officer maintained inspectors in each of these factories and plants for the inspection of materials and finished shoes. However, in the factories and plants manufacturing leather, rubber heels, rubber soles, cut soles, counters and cartons, no inspectors were maintained and these factories and plants were not named in any contract (R. 177). Further, the articles produced in the petitioner's tanneries, rubber mills and sole cutting, counter and carton plants were not articles of the general character called for in the shoe contracts (R. 16, 17, 18).

After these contracts had all been performed the Department of Labor commenced a proceeding against Endicott Johnson Corporation, claiming that in performing its contracts with the United States it had not complied with

*The entire stipulation or representation appears in Section 1 of the Act, pages 49 and 50, *infra*.

the Act in the factories and plants manufacturing leather, rubber heels, rubber soles, cut soles, counters and cartons. It was claimed that the Act applied to those factories and plants, as well as to the factories manufacturing shoes, even though the acting administrator of the Act had ruled, previously, in a similar situation, that the manufacture of articles to be used in the finished product was not part of the manufacture of the finished product (R. 50, 51, 52).

On December 7, 1939 the Department served in the proceeding the subpoenas *duces tecum* involved herein. These subpoenas called for the production of "all time cards, time books, employees' wage statements and payroll records, showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation", in certain factories and plants during various periods between October 26, 1936 and October 11, 1938. The petitioners willingly furnished the information as to the shoe factories, but refused to produce the record as to the factories and plants manufacturing leather, etc. on the ground that those factories and plants are not covered by the Act.

On January 15, 1940 an action to enforce the subpoenas, under Section 5 of the Act, was commenced in the District Court for the Northern District of New York. The complaint or application, by which this proceeding was begun, alleged that the Secretary "has reason to believe" that the Act covers the operations of the petitioner in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons (R. 5, Par. 9). In its answer the petitioner denied that the Act covered the factories and plants in question (R. 13, Par. Ninth). On June 26, 1940 the Secretary moved for a judgment upon the pleadings, for sum-

mary judgment, or for an order enforcing the subpoenas (R. 36). The motions for judgment on the pleadings and for summary judgment were denied and the District Court set the matter down for a hearing on the issue of whether the Act applies to the operations of the corporate petitioner in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons (R. 63-65).

The Secretary then amended her complaint to add allegations that persons employed in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons were engaged in producing articles used in performance of the contracts, and renewed her motions for summary judgment and for judgment on the pleadings (R. 65-67). In April, 1941 a hearing was held before the District Court on the issue of the coverage of the Act. The District Court found that on the evidence on this issue the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons was not a part of the manufacture of shoes and that accordingly the Act does not apply to those operations of the corporate petitioner (R. 278-284). On October 27, 1941 a final order was entered which denied the Secretary's motions and dismissed her complaint and application.

On appeal to the United States Circuit Court of Appeals for the Second Circuit it was held that these subpoenas *duces tecum* should be enforced on the pleadings. It was held that if the complaint alleges coverage, though it be denied, a hearing on that issue should not be held, as the District Court has no power to inquire into the coverage of the Act; the subpoenas *duces tecum* must be enforced without further question (R. 298-332).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the District Court must enforce the subpoenas *duces tecum* on the allegation, though it be denied, that the Act applies to the operations of the petitioner in its factories-plants manufacturing leather, rubber heels, rubber soles, cut soles, counters and cartons.
2. In holding that a hearing should not be held to determine the applicability of the Act in a proceeding in the District Court brought to enforce subpoenas *duces tecum*, even though the applicability of the Act is in issue in the action.
3. In reversing the decrees of the District Court.

SUMMARY OF ARGUMENT

1. Congress intended that a District Court should determine the issue of jurisdiction before enforcement of an administrative subpoena.

The issuance of a subpoena is a judicial act and carries with it the power to punish for non-compliance therewith. If Congress did not intend a district court to determine the coverage of the Act, i.e., jurisdiction of the administrative body, when called upon to enforce a subpoena it would have given the administrative body the judicial power to enforce its own subpoena. This it has never done. If the Court cannot determine the right of the administrative agency to issue the subpoena, including a determination of its jurisdiction, the Court's function is not a judicial one.

II. *Denial to the District Court of power to determine jurisdiction on the application to enforce an administrative subpoena duces tecum, violates the Fourth Amendment to the Constitution.*

The Fourth Amendment forbids an unlawful search or seizure. A search and seizure by an administrative agency which does not have jurisdiction is an unlawful search and seizure. Since the search and seizure occurs when the subpoena *duces tecum* is enforced, if the jurisdiction of the administrative agency is not determined judicially before the documents have to be produced, there is no constitutional protection against an unreasonable search and seizure. The Fourth Amendment is, therefore, rendered completely futile.

III. *The Construction of the Act by the Circuit Court of Appeals as to the powers of the District Court violates Article III of the Constitution.*

Article III of the Constitution, as interpreted by this Court, confines the powers of District Courts to those of a judicial nature. The enforcement of an administrative subpoena is not a judicial function unless the District Court has power to determine the issues passed upon by it in this case.

IV. *The arguments advanced by the Circuit Court of Appeals to support its conclusion, not previously dealt with in this brief, are unsound.*

The Circuit Court of Appeals has advanced several arguments to support its conclusion which have not been discussed in the chapters of this brief on the intention of Congress and on the application of the Constitution. These arguments are unsound.

V. *The Act does not apply to the manufacture of leather, rubber goods and cartons under contracts for the sale of shoes.* The District Court, having found that the Act does not apply to the manufacture of leather, rubber goods, counters and cartons, its determination of this question of fact should not be upset by an appellate court unless "clearly erroneous".

The evidence in this case shows clearly that manufacture of leather, rubber goods, cut soles, counters and cartons is not subject to the Act and that the decision of the District Court is correct.

ARGUMENT

I

CONGRESS INTENDED THAT A DISTRICT COURT SHOULD DETERMINE THE ISSUE OF JURISDICTION BEFORE ENFORCEMENT OF AN ADMINISTRATIVE SUBPOENA.

Congress did not intend that a District Court should enforce compliance with a subpoena *duces tecum* without inquiring into the applicability of the Act, which of course determines the jurisdiction of the administrative agency issuing the subpoena. No court has ever held that it so intended except the court below* and many courts, including this one, have held to the contrary.

The case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 (1894) is a landmark in administrative

*The justification which the Circuit Court used for departing from the holdings of this Court is that its decision is more in conformity with the "trend" of this Court's recent decisions concerning administrative bodies (R. 315-317).

law, frequently cited today, and is directly contrary to the opinion of the court below.* There the Interstate Commerce Commission petitioned the Circuit (District) Court to enforce a subpoena under Section 12 of the Interstate Commerce Act, as amended (26 Stat. 743). The defendants contended that when a court was called upon to enforce an administrative subpoena, it was called upon to perform a non-judicial function; that the enforcement of an administrative subpoena was an administrative act and that accordingly Section 12 of the Act was unconstitutional. This Court denied that contention on the ground that the court was called upon, in such a proceeding, to perform a judicial function. The Court said at page 479:

"Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, *nor to any matter which the Commission is entitled under the Constitution or laws to investigate*. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits." (Emphasis supplied)

*Yes, strangely enough, this case was not even referred to in the opinion of the court below.

The Court further stated that subpoenas must be enforced "if such matter is one which the Commission is legally entitled to investigate . . ." (p. 476). The entire opinion in this case is "instinct with an obligation" of a District Court to determine the authority of administrative agencies before enforcement of subpoenas, if that authority is challenged.

Harriman v. Interstate Commerce Commission, 211 U. S. 407 (1908) applied the principles laid down in the *Brimson* case, *supra*. There it was held that certain questions propounded to a witness in a proceeding before the Interstate Commerce Commission were improper. The questions were designed to produce evidence on a subject not within the Commission's authority. This Court therefore passed upon the coverage of the Act, the jurisdiction of the Commission and the validity of evidence while proceedings were pending before the Commission.

Ellis v. Interstate Commerce Commission, 237 U. S. 434 (1915). It was there held that questions were improper if not designed to show that a company, not subject to the jurisdiction of the Commission, was being used as a secret device for evading jurisdiction. The Court therefore again passed on the jurisdiction of the Commission, the coverage of the Act and the validity of evidence when proceedings were pending before the administrative body.

In *Jones v. Securities & Exchange Commission*, 298 U. S. 1 (1936), this Court held that the validity of proceeding before the Securities and Exchange Commission could be raised when the Commission sought to enforce subpoenas issued in that proceeding. In both *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) and *Federal Power*

Commission v. Metropolitan Edison Co., 304 U. S. 375 (1938), this Court stated, in effect, that if an administrative agency applied to a court for enforcement of a subpoena "appropriate defense may be made". The opinion of the Circuit Court of Appeals in the case at bar interprets these statements to mean only that "there could be no enforcement of the subpoena if the administrative proceeding, had in some manner, been ended" (R. 317)*. The Circuit Court has therefore very narrowly construed the language of this Court and held that "appropriate defense" must be limited to the single defense that the administrative proceeding has been ended. Such a confinement of this Court's language is not justified. It is directly contrary to the holdings of this Court in the *Brimson*, *Ellis* and *Harriman* cases, *supra*.

In *Goodyear Tire & Rubber Co. v. National Labor Relations Board*, 122 F. (2d) 450 (C. C. A. 6th, 1941), *Cudahy Packing Co. v. National Labor Relations Board*, 117 F. (2d) 692 (C. C. A. 10th, 1941) and *General Tobacco & Grocery Co. v. Fleming*, 125 F. (2d) 596 (C. C. A. 6th, 1942)*, the Circuit Courts of Appeals held that before administrative subpoenas should be enforced the District Court must find whether the Act applied to the defendant and whether the Act is constitutional, if those points are put in issue by the answer. In the *General To*

*There are several decisions of the District Courts which are contrary to the decision of the Circuit Court of Appeals in the instant case. These include *National Labor Relations Board v. New England Transp. Co.*, 14 Fed. Supp. 497 (1936); *Securities and Exchange Commission v. Tung Corporation*, 32 Fed. Supp. 371 (1940); *Gates v. Graham Ice Cream Co.*, 31 Fed. Supp. 854 (1940).

bacco & Grocery Co. case, *supra*, the Court said, at page 599:

"An administrator must restrain himself within the bounds of his delegated authority. It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects."

In *Bradley Lumber Co. v. National Labor Relations Board*, 84 F. (2d) 97, 100 (C. C. A. 5th, 1936), certiorari denied 299 U. S. 559, the Court said:

"The appellants can have a recognition of all their just rights under the scheme of procedure set up by the act. Even in advance of a final order by the Board, jurisdiction can regularly be brought under judicial scrutiny, because no subpoena can be enforced nor any document or book be compelled to be produced, nor any other order enforced save by appeal to a court, which would then and there refuse to sanction or aid any clear usurpation."

In *E. I. Dupont de Nemours & Co. v. Boland*, 85 F. (2d) 12, 15 (C. C. A. 2d, 1936), the Court said:

"Appellants' right to contest the examination of records or the compulsion of testimony may be asserted when application is made to enforce a subpoena. *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160, 47 S. Ct. 553, 71 L. Ed.

978; *Federal Trade Commission v. Maynard Coal Co.*, 7 App. D. C. 297, 22 F. (2d) 873."*

The case of *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7th, 1940), certiorari denied 311 U. S. 690, related to a subpoena challenged, not because of jurisdiction or coverage, but only on the ground that it was to be used in a general investigation and not for a specific charge of violation of the Act. The opinion of the Court contains no language which indicates that a subpoena should be enforced wholly apart from, and without consideration to, the applicability of the statute. Indeed, the opinion states that a subpoena should be enforced only when issued by "duly constituted authority". Certainly, a subpoena issued by a body having no jurisdiction is not a subpoena issued by "duly constituted authority".

If a mere allegation of jurisdiction is sufficient for the enforcement of an administrative subpoena, then Congress

**Cf. Cudahy Packing Co. v. Fleming*, 122 F. (2d) 1005 (C. C. A. 8th, 1941), where it was held that a subpoena should be enforced which called for records of a plant engaged solely in intrastate commerce. In this case, however, it appeared that the defendant also had a plant engaged principally in interstate commerce and it was contended by the administrative agency that some of the employees in the plant engaged solely in intrastate commerce were concerned with the goods manufactured in the interstate commerce plant. In other words, there was a mixture of employees and the administrative agency could not decide which employees came within its jurisdiction and which did not, without the records of both plants. So in the case at bar, the records of all the employees in the shoe factories have been furnished, and may be demanded by the Secretary even though many of the employees are exempt under the terms of the Act.

would have given the power to the administrative agency to enforce its own subpoena. This it has not done.* Fur-

*Apparently in all statutes the agency may obtain enforcement of subpoenas only by invoking the aid of a Federal Court. *Federal Trade Commission Act*, 38 Stat. 722, 15 U. S. C. §§ 49, 50; *Fair Labor Standards Act*, 52 Stat. 1065, 29 U. S. C. § 209, adopting the provisions of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. §§ 49, 50; *The Interstate Commerce Commission Act*, 25 Stat. 859, 49 U. S. C. § 12(3); *Bituminous Coal Act of 1937*, 50 Stat. 86, 15 U. S. C. § 838; *National Labor Relations Act*, 49 Stat. 456, 29 U. S. C. § 161(2); *Packers and Stockyards Act*, 42 Stat. 168, 7 U. S. C. § 222, adopting the provisions of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. §§ 49, 50; *Veterans Administration Act*, 49 Stat. 2033, 38 U. S. C. § 133; *Railroad Unemployment Insurance Act*, 52 Stat. 1107, as amended, 45 U. S. C. § 362(b); *Merchant Marine Act*, 49 Stat. 1991, 46 U. S. C. § 1124(b); *Federal Power Act*, 49 Stat. 857, 16 U. S. C. § 825f(c); *Securities Act of 1933*, 48 Stat. 87, 15 U. S. C. § 77t(c); *Securities Exchange Act of 1934*, 48 Stat. 900, 15 U. S. C. § 78u(c); *Public Utility Holding Company Act*, 49 Stat. 831, 15 U. S. C. § 79r(c); *Communications Act*, 48 Stat. 1096, 47 U. S. C. § 409(c), (d); *Civil Aeronautics Act of 1938*, 52 Stat. 1021, 49 U. S. C. § 644(c); *Motor Carrier Act*, 49 Stat. 550, 49 U. S. C. § 305(d), incorporating provisions of the Interstate Commerce Act, 25 Stat. 859, 49 U. S. C. § 12(3); *Longshoremen's and Harbor Workers' Compensation Act*, 44 Stat. 1438, 33 U. S. C. § 927(b).

The final report of the United States Attorney General's Committee on Administrative Procedure (1941) states that the aid of Federal Courts must be invoked for the enforcement of subpoenas and regarding enforcement of subpoenas, states, at page 414:

"Some agencies are authorized to apply directly to the courts, while others may seek judicial aid only through the Attorney General, or a United States District Attorney."

The report analyzes the statutes creating 29 separate agencies. In none of them is the agency itself given the power to enforce its subpoena.

In Eberling "Congressional Investigations" (1928), it is stated, at page 392:

"It is a fundamental fact in a discussion of the inquisitorial powers of such administrative bodies that they cannot themselves compel a witness to appear before them and testify. The same rule applies, as has been noted, to investigating com-

thermore, it is doubtful if it could do so. In *Interstate Commerce Commission v. Brimson*, *supra*, at page 485, this Court said:

"The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

If the invalidity of the subpoena appears on its face, a simple motion to quash the subpoena would be sufficient. *Schuricht v. McNutt v. Willis*, 26 F. (2d) 388 (1928); *Electric Vehicle Co., et al. v. Craig Toledo Motor Co., et al.*, 157 Fed. 316 (1907); *Rubel v. Beaver Falls Cutlery Co.*, 22 Fed. 282 (1884); *United States v. American Bell Telephone Co. and others*, 29 Fed. 17 (1886); see also *Federal Rules of Civil Procedure*, § 45(d).

The power of Congress itself to enforce a subpoena which calls for documents or which relates to a matter

mittees acting on authority of Congress. "The courts have said, 'In a judicial sense there is no such thing as contempt of a subordinate administrative body * * * and the power to compel performance of a legal duty imposed by the United States can only be exerted under the law of the land, by competent judicial tribunal having jurisdiction in the premises' (*Interstate Commerce Commission v. Brimson*, 154 U. S. 489, 1894). Hence the enforcement of the power conferred on these tribunals to compel testimony must therefore be reposed in the courts."

outside of its jurisdiction can be questioned. *Kilbourn v. Thompson*, 103 U. S. 168 (1880); *In re Chapman*, 166 U. S. 661 (1897); *McGrain v. Daugherty*, 273 U. S. 135 (1927); *Sinclair v. United States*, 279 U. S. 263 (1929); *Jurney v. MacCracken*, 294 U. S. 125 (1935). In *Kilbourn v. Thompson*, *supra*, this Court said that Congress did not have power to enforce a subpoena unless the witness'

"* * * testimony is required in a matter into which that House has jurisdiction to inquire * * *." (p. 190)

"If they [Houses of Congress] are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown * * *." (p. 197)

In *In re Chapman*, *supra*, this Court decided that although a statute made punishable any deliberate refusal to answer "any question pertinent to the matter of inquiry in consideration"

"* * * the word 'any', as used in these sections, refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon." (p. 667)

Administrative agencies have no inherent subpoena power. *Cudahy Packing Company v. Holland*, 315 U. S. 357 (1942). An administrative agency is a statutory body and has no powers not specifically given it by the Legislature. *Interstate Commerce Commission v. Illinois Central Railroad Company*, 215 U. S. 452, 470 (1910); *Anderson v. Dunn*, 6 Wheat. 204, 233 (1821); von Bauer, *Federal Administrative Law*, Vol. 1, page 65.

* * *

We now turn to the language of the Act (Sec. 5). The Secretary is authorized "on complaint of a breach or violation of any representation or stipulation" provided in the Act "to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath". The Act, thus, does not give the Secretary a general authority but a specific authority—one limited to the breach or violation of any representation or stipulation provided in the statute.

In the event of contumacy, failure or refusal of any witness to obey the order of the Secretary, then the Act provides:

"* * * any District Court of the United States * * * shall have jurisdiction to issue to such person an order requiring such person to appear * * *, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof;"

The Act thus in normal language gives jurisdiction to the District Court. The jurisdiction that can be given to the District Court is determined, of course, by Article III of the Constitution:

"* * * it is not open to question that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs," (*Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74).

The Constitutional Courts of the United States cannot be given any jurisdictional power that is legislative or administrative as contrasted to judicial. The jurisdiction granted to them must be judicial. Thus, when Congress in Sec. 5 of the Act granted the District Court jurisdiction it must be assumed that it obeyed the Constitution and granted it jurisdiction that was judicial and only judicial, and there is not the slightest indication that Congress intended otherwise.

When an applicant's claim for relief is challenged on the ground of the applicant's lack of capacity to claim the relief or lack of right to the relief, then the regular judicial proceedings for the establishment and enforcement of rights requires that that challenge be determined. If the District Court were bound to enter an order for the relief requested, regardless of any challenge thereof, it would not be a court exercising judicial functions but it would be an agency performing ministerial duties which are not the function of a court and which under the Constitution may not be given to a District Court.

Let us note just what the issue is.* The petition of the Secretary made it clear. Admittedly, the shoes were made only in the shoe factories at Binghamton and Johnson City. The evidence sought is with respect to other plants, which admittedly were not even shoe plants, and jurisdiction of those plants is claimed only because they tanned leather, etc., some of which ultimately found its way into the shoes covered by the contracts. Note that the application calls for records with respect to "calfskin tannery", "upper leather tannery", "sole leather tannery", etc. (R. 5).

*It should be noted that the evidence under subpoena is not sought to determine or establish jurisdiction, but to determine violation.

In the case at bar the contracts called for the manufacture of shoes in specific factories, and the Secretary seeks under the Act to secure the records of the calfskin tannery, for no reason other than that some of the calfskin tanned went into the shoes. Unless the Act covered the tannery, i.e., unless the representations or stipulations of the contract covered the tannery, there is no breach or violation within the jurisdiction of the Secretary for investigation.

From the standpoint of the District Court, when the Secretary petitions it for relief which the Corporation challenges, a normal exercise of the judicial process requires the Secretary to show his authority to demand relief. Neither the Secretary nor anyone else can require a District Court to grant an order for the examination of a person's books and records without showing the Court due authority for the request. If the applicant has no authority to justify the application, it must be denied. Hence, essentially, at the threshold there always lies the question of the authority for the applicant's request, and if judicial action is to be had, that question must be first determined if put in issue. Thus, the Secretary in our case sought to justify her demand for the records of the tannery by alleging a contract for the manufacture of shoes in a shoe factory. The Corporation denies that its contract or its representations or stipulations had anything to do with the tannery or the product of the tannery, and thus asserts that the Secretary is going beyond the powers granted by the Act. If the Corporation is right that the Act did not authorize this proceeding by the Secretary, then there is no basis for the granting of the Secretary's petition. It would seem to be inevitable that if this question is raised it must

be decided, if the Court is exercising judicial jurisdiction. There is nothing to indicate that Congress intended, or even could have intended, the District Court of the United States to do otherwise.

The Court below necessarily belied its own principles. It had to admit that if the Secretary's petition did not allege that there was a contract under the Act the Court should not proceed; but apparently if the Secretary alleges that fact, then, regardless of its denial, the Court must proceed. In other words, we have the anomalous situation that the Court must grant relief not because of the fact but because of what a petitioner says the fact is. The Secretary would have the statute construed as though it read: "Any District Court of the United States shall forthwith order the production of any evidence that the Secretary may demand, upon the petition of the Secretary alleging that he is entitled to such evidence, and the allegations of the Secretary's petition shall be irrebuttable." Congress did not say that; it never has said it in any statute. Congress has never even attempted to limit the jurisdiction of the courts in passing upon the enforcement of its own subpoenas. Congress in the Act has granted the District Court jurisdiction just as it regularly grants jurisdiction in other situations—a jurisdiction of the type and quality required by Article III of the Constitution—a jurisdiction which consists of, and is limited to, the exercise of the judicial function.

We urge that the construction urged by the respondent is erroneous without resort to the Constitution; but the error is even more manifest when the Act is read against the background of Article III and the Fourth Amendment.

DENIAL TO THE DISTRICT COURT OF POWER TO DETERMINE JURISDICTION ON THE APPLICATION TO ENFORCE AN ADMINISTRATIVE SUBPOENA DUCES TECUM VIOLATES THE FOURTH AMENDMENT TO THE CONSTITUTION.

It is unnecessary for this Court to hold that the Act requires enforcement of a subpoena *duces tecum* by a District Court without a hearing to determine the jurisdiction, if in issue, of the administrative agency constitutes an unreasonable search and seizure. Under the principle that a statute will not be interpreted so as to lead to a result which is or might be unconstitutional if another interpretation is available (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1936)), the duty of the District Court should be held to be as claimed by us in Point I.

Under the opinion of the Circuit Court of Appeals and the result reached by that Court, enforcement of the subpoena *duces tecum* would undoubtedly constitute an unreasonable search and seizure in violation of the Fourth Amendment. *Boyd v. United States*, 116 U. S. 616 (1886); *In re Pacific Ry. Com'n.*, 32 Fed. 241 (C. C., N. D. Cal., 1887); *Hale v. Henkel*, 201 U. S. 43 (1906); *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298 (1924). The subpoena *duces tecum* calls for the production of documents. If the agency has no jurisdiction or authority the production of the documents is clearly unlawful. (*Interstate Commerce Commission v. Brimson*, *supra*; *Jones v. Securities and Exchange Commission*, *supra*). If

the District Court has no power to determine beforehand the jurisdiction or authority of the administrative agency, there can be no review at any time of the jurisdiction of the administrative agency before the documents have been produced. *The production of the documents constitutes the search and seizure. A review after they have been produced, if their production is unlawful, is too late. At that time there has already been a violation of the Fourth Amendment.* The situation would be exactly the same as though Skinner in *Skinner v. Oklahoma*, U. S. (86 L. Ed. 1130) (1942) had been rendered sterile before the order of this Court holding the sterilization statute invalid.

If the petitioners refuse to produce the documents after a court order (as they have refused to produce them when ordered by the administrative agency) they would be subject to a penalty for contempt of court. They would therefore be subject to a deprivation of their liberty from search and seizure without a judicial hearing and without a determination that the documents pertained to a subject which the administrative agency had the authority to inquire into.

The Act here involved, unlike some other Acts, permits an examiner holding the hearing to issue subpoenas. If the subpoena *duces tecum* issued by the examiner (a subordinate official of the Department of Labor)* be enforced without judicial action on the asserted objection of the Company, *there is no judicial protection against violation of the Fourth Amendment.* The Fourth Amendment was de-

*The examiners average 36 years of age; their salaries vary between \$3,200 and \$5,400 per annum. (Final Report of the Attorney General's Committee on Administrative Procedure, page 392.)

signed to protect citizens from unlawful searches and seizures. Its history has been judicially noted.

United States v. 1013 Crates, etc., 52 F. (2d) 49, 51. (C. C. A. 2nd, 1931).

"The Fourth Amendment which prohibits unreasonable searches and seizures, is one of the pillars of liberty so necessary to a free government that expediency in law enforcement must ever yield to the necessity for keeping the principles on which it rests inviolate. In this spirit alone it is safe to attempt to solve the problem which now confronts us.

* * *

"One of the things, which no great study of the history of the times which led to the adoption of this amendment will reveal, is an abhorrence of searches and seizures based on nothing but the desire to bring to light and into the clutches of the law whatever may, by chance, be found. No period of freedom from such an evil, however long it may be, should lull us into a false sense of security and lead us to permit this always necessary safeguard of liberty to be weakened in exchange for the temporary advantage of more thorough or certain enforcement of some law, however beneficial."

In the dissenting opinion of Mr. Justice Brandeis, in the case of *Olmstead v. United States*, 277 U. S. 438, 479 (1928), he stated:

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty

lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

In *Sinclair v. United States*, *supra*, the Court said, at page 292:

"It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. In order to illustrate the purpose of the courts well to uphold the right of privacy, we quote from some of their decisions."

Surely the application of the Fourth Amendment to the Constitution cannot be relegated to the final decision of a subordinate official of an administrative agency.

In a brief filed with this Court in the case of *Cudahy Packing Company v. Holland*, 315 U. S. 357 (1942), the Department of Labor stated that to satisfy the requirements of the Fourth Amendment a subpoena must relate to production of documents "which appear to be relevant to a lawful subject of inquiry". If the administrative agency is not authorized to conduct the hearing certainly the production of documents for use in that hearing does not relate to "a lawful subject of inquiry"; also the issue of whether they "appear to be relevant" must be decided. Therefore, even if we should accept this statement, the District Court nevertheless must decide these questions before compelling the production of the documents. If the District Court is prohibited from deciding even these questions, the protection of the Fourth Amendment disappears.

Respondent has likened the proceedings here to a Grand Jury investigation, but that analogy, gives the respondent no aid.

In *Hale v. Henkel*, 201 U. S. 43 (1906), the proceeding originated in a subpoena *duces tecum* commanding Hale to appear before the Grand Jury. The Supreme Court said (p. 76):

"We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. * * * the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum*, against which the person, be he individual or corporation, is entitled to protection."

The Court examined the subpoena and found it too broad, saying:

"A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms."

This is a direct refutation of the Secretary's position in the case at bar. The Supreme Court rejected the view that a court had to enforce a subpoena *duces tecum* if issued by a Grand Jury, because of the protection of the Fourth Amendment. The analogy to a search warrant that was drawn by the Supreme Court is illuminating. Under the Fourth Amendment the Company in the case at bar is entitled to the same protection against a subpoena *duces tecum* issued by an administrative agency as it would be against a search warrant issued by an administrative agency.

III.

THE CONSTRUCTION OF THE ACT BY THE CIRCUIT COURT OF APPEALS AS TO THE POWERS OF THE DISTRICT COURT VIOLATES ARTICLE III OF THE CONSTITUTION.

The decision of the Circuit Court of Appeals is this: When an administrative officer applies to a District Court for an order for the production of testimony, and his petition contains allegations of fact or of law or of mixed fact and law to the effect that he is entitled to his relief, then the District Court must grant it, regardless of the challenge of those allegations; the District Court cannot decide the issues presented; it must accept the allegations as correct, including those of law as well as of fact; or, to put it more realistically, it must act as requested, regardless of the correctness of the allegations. If the applicant's petition is in the correct form the District Court must grant it; it cannot pass on questions of fact or law although put in issue.

This raises squarely the issue whether the jurisdiction of the District Court, as so determined, is in conformity with Article III of the Constitution.

Keller v. Potomac Electric Co., 261 U. S. 428 (1923) is one of numerous instructive cases. The power there in question the Supreme Court held might be properly vested in the Courts of the District of Columbia under Clause 17, Sec. 8, Article I of the Constitution, but could not be vested in the Supreme Court or in the inferior courts of the United States under Article III of the Constitution. The Court said:

"Such legislative or administrative jurisdiction, it is well settled cannot be conferred on this Court

either directly or on appeal. * * * The principle there* recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior Courts of the United States ordained and established by Congress under and by the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them * * *.

This Court in that case found it necessary to define what constituted judicial power, and it quoted from an earlier decision as follows (p. 440):

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end."

Thus, we are given a criterion in determining the constitutionality of a power asserted to be lodged in a District Court.

In *Liberty Warehouse Co. v. Grannis*, *supra*, this Court expressed the concept in these words:

"* * * in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights or the prevention, redress, or punishment of wrongs."

In a long line of cases this Court has settled the law to be:

"The jurisdiction and duties of the Supreme Court and Circuit Court of Appeals are similar in all respects to those of the District Court. Neither has

**Muskat v. U. S.*, 219 U. S. 346 (1911).

any power or function other than what is strictly judicial." (*Commissioner v. Havemeyer*, 296 U. S. 506, 518 (1936)).

We do not seek to burden the Court with the citation of further authority for principles which have been clearly established in these and many other cases, but it is peculiarly relevant and instructive to examine the case in which this Court first held that the grant of jurisdiction by Congress to the Federal Courts to enforce subpoenas of an administrative agency was permissible under Article III. We refer to *Interstate Commerce Commission v. Brimson*, *supra*. This Court overruled the argument that this power could not be given to the District Courts because it found that there was a controversy which called for the exercise of the judicial power.

"Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or produce books, papers, etc. in his possession, is or is not in violation of his duty or in derogation of the rights of the United States seeking to execute a power expressly granted to Congress, are distinct issues between that body and the witness. * * * And these issues made in the form prescribed by the Act of Congress are so presented that the judicial power is capable of acting on them" (pp. 476-7).

Thus, this Court sustained the jurisdiction of District Courts to enforce administrative subpoenas only because this Court found that the issue which the Company sought to raise in this case, could be raised. It was the presence of such issues that made the judicial power capable of action. Hence, the denial of the power to the District Court

to act upon such issues removes the only basis for sustaining the constitutionality of the grant of jurisdiction.

We urge that the power exercised by the District Court in our case was rightfully exercised; that if the power of the District Court is to be limited as ruled by the Circuit Court of Appeals, then the District Court would not be performing a judicial function, and the grant of jurisdiction to a District Court to perform only that which the Circuit Court of Appeals would permit, would be a violation of Article III of the Constitution. The power which the District Court exercised was a *sine qua non* to constitutional jurisdiction in the Federal Court.

IV

THE ARGUMENTS ADVANCED BY THE CIRCUIT COURT OF APPEALS TO SUPPORT ITS CONCLUSION, NOT PREVIOUSLY DEALT WITH IN THIS BRIEF, ARE UNSOUND.

In the foregoing points in our brief we deal with some of the arguments advanced by the Circuit Court of Appeals in support of its decision. We deal now with other arguments advanced by that Court in its opinion.

It will be noted that the Court below paid very little attention to the Fourth Amendment, and by completely ignoring *Interstate Commerce Commission v. Brinson* it avoided dealing with Article III of the Constitution.

(a) The principle of *Cogen v. United States*, 278 U. S. 221 (1929), and cognate cases cited in the opinion has nothing to do with the issue at bar. These cases dealt with the problem of right of appeal after the party had had one judicial determination of the issues raised by him as to his tes-

timony and books and records. The Constitution does not grant anyone the right of appeal. In the cases to which the lower Court refers the party had already received that which the Court would deny to Endicott Johnson Corporation, namely, a judicial hearing and decision on the issues raised. Those cases dealt merely with the right to appeal from an adverse decision.

In those cases as well as in *Alexander v. United States*, 201 U. S. 117 (1906) and *Cobbledick v. United States*, 309 U. S. 323 (1940) there had already been a judicial hearing and determination of the issues that the party wished to raise, and the only question up for decision was whether there was an immediate right to appeal. Even in these cases it is interesting to note that this Court has held that where the issue arises from the enforcement of a subpoena of an administrative agency the right to appeal is immediate. The cases in which the right to appeal is not immediate are where the subpoena has been issued out of a Court (See *Perlman v. United States*, 247 U. S. 7 (1918)), as explained in *Cobbledick v. United States*).

(b) The Court below suggests (R. 310) that it really does not do the party any harm to compel him to produce his books and to give testimony, because if the final decision of the Administrator is wrong on the merits this decision can be corrected on judicial review. It is obvious that this argument completely ignores the Fourth Amendment. It is an argument that there is no objection to an unreasonable search and seizure, provided the Court can ultimately see to it that the judgment of the Administrator on the merits is correct. The Fourth Amendment is not so conditioned; if it were so conditioned most of its meaning would be gone. The Fourth Amendment is not designed to

protect a person against an erroneous judgment for damages; it is to protect his freedom from unlawful search and seizure.

Incidentally, we should point out that the Court below is in error in implying that the Corporation has the right of judicial review of the determination of the Secretary, for this is one Act in which the customary provision for review is lacking. If the Secretary decides against the Corporation, and puts it on the "Black List" by way of penalty, it is by no means clear that there is anything that the Corporation can do about it. Certainly, the statute purports to give it no rights. It is only if the Secretary determines to assess money damages against the Corporation and turns the case over to the Attorney General, and the Attorney General, in the exercise of his discretion, decides to bring suit, that the Corporation is given a right to review the action of the Secretary. However, the right to review an assessment of damages—or, for that matter, an ultimate dismissal of the case by the Secretary—would be no justification for a violation of the Fourth Amendment.

(c) The Court below advances the argument (R. 311) that "today the administrative and judicial processes are specifically said to be collaborative". But the issue here presented is not whether they shall be collaborative, but whether the judicial process shall be subordinate to the administrative process, i.e., whether when the Administrator asks for the production of evidence the Court must grant the request without exercising the judicial process. When the Courts involved are the District Courts and the other constitutional Courts of the United States, their power must be tested by Article III of the Constitution, which the Court below ignored. According to the Court below, when the admin-

istrative agency decides that an Act applies to the situation, the District Court must help the agency; that is not collaboration, for the administrative agency would have done all the deciding and the District Court would have been merely the "rubber stamp". Such an abnegation of judicial power is not permissible.

(d) The Court below stressed the importance of promptness (R. 312) and the desirability of expedition (R. 316).

This argument is older than the Bill of Rights—probably it is one of the reasons why we have the Bill of Rights. The nations which do not have it, have at times presented us with spectacles of judicial and administrative officials apparently attaining ends faster than do those of the United States and England. There is the query whether in the end there is more speed; but regardless of that query it is basic in the legal systems of these two countries that there is something more fundamental and more desirable than speed in any particular case. It is but another form of arguing that the end justifies the means. The impatient administrative official and the impatient prosecuting attorney will, now and again, be slowed up by the Bill of Rights, and sometimes even thwarted in their objectives; but that is the price we have been willing to pay for the Bill of Rights, and it is generally believed that the price is a small one. No one denies the desire for speed in the administrative process, but it cannot be at the expense of the denial of the right of freedom from unlawful search and seizure.

Furthermore, Article III of the Constitution must be considered here, as in other situations in the past where it was sought to ignore it to attain aims that seemed desirable. But the District Court of the United States cannot be

made a "rubber stamp" of an administrative official because it will enable that official to act more promptly. The argument that the Court has here used would sustain the grant of power to the administrative agency to enforce its own subpoenas, for that certainly would be still speedier than having to use the Court as a "rubber stamp".

Finally, it is far from clear that the decision of the lower Court does make for speed, if we look at the ultimate goal rather than the preliminary steps toward it. In the case at bar the fundamental question which should be decided (and which the Court below claims must ultimately be decided) is whether the Act applies to the tanneries, etc. The Court below seemed to think that time would be saved by postponing the decision of that question until all the evidence was gathered and long and expensive proceedings were had. It would seem more plausible, however, that the decision of the basic question at the outset might well save much time, trouble and expense. It is upon that line of reasoning that the common law evolved the demurrer and modern practice favors the early motion to dismiss, for if plaintiff does not really have a cause of action, why waste time going to trial? Certainly, it is difficult to assert that the views of the Court below as to what will be speediest are so inescapably true that one should be tempted to cut short corners with the Fourth Amendment and the Third Article of the Constitution.

(e) The Court below suggests that because the Corporation could not enjoin the Secretary's proceeding, therefore, it could not be heard to set up any defense or assert any rights when the Secretary brought this proceeding against it. That would seem to be an obvious *non sequitur*. The Fourth Amendment is a shield, and not a sword. There

are innumerable situations in which a party has a complete defense but cannot stop the institution of proceedings. The common-sense reason for this is clear. A person is not constitutionally harmed by the institution of a proceeding, but the harm comes when he is unreasonably required to produce documents and records. There is no constitutional protection against being sued; the protection is against unreasonable search and seizure.

Furthermore, the very cases in this Court, cited by the Court below on this point belie its own statement. They point out clearly the situation of a person who has moved in vain to quash a subpoena. They point out that in certain instances he may not appeal from the order, but what he can do is refuse to obey the order, and then appeal from the order holding him in contempt. Surely, these cases actually hold to be correct, what the Court below refers to contemptuously as "running around the end when blocked at the center". These cases show convincingly that there is no validity in the argument that because something cannot be accomplished in one way it cannot be accomplished in another.

The Court below has cited *Jones v. Securities and Exchange Commission*, 298 U. S. 1; but that case, interestingly enough, refutes the argument of the Circuit Court of Appeals. Let us examine into what happened: Jones tried, first, to enjoin the Commission's proceeding, on the ground that it had ended. He was unsuccessful in so doing by the decision of the Second Circuit Court of Appeals (79 Fed. (2d) 617), and this Court denied certiorari (297 U. S. 705). But when the Commission undertook to serve him with a subpoena he was permitted successfully to attack the

enforcement thereof; and this Court held, in 298 U. S. 1, that the subpoena could not be enforced. In other words, this Court in that case did exactly what the Circuit Court of Appeals claims ought not be done.

The Court below conceded (p. 331) that

"An administrative proceeding might on the face of the record, be so clearly without legal foundation that a Court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding."

Nevertheless, the law is clear that an administrative proceeding could not be enjoined on that ground. Thus, the Court itself shows that its criterion is not sound, for it agrees that a subpoena should not be enforced in a situation where the proceeding itself could not be enjoined.

(f) The Court below argues that the Administrator's officers "if not always themselves experts, are specialists, advised by experts". For that reason, that Court has said that great reliance should be placed upon their findings.

The Court cites *Gray v. Powell*, 314 U. S. 402 (1941). Indeed, that case will serve well the purpose of indicating the difference between what this Court had in mind in announcing the rule, and the situation in the case at bar. In the *Gray* case the Coal Director, after a protracted hearing with evidence submitted on both sides, found it to be the fact that a certain railroad was not a coal producer, and this Court refused to disturb that finding. The relevancy of that situation to the one at bar is difficult to see. Surely, the Corporation is not here arguing that weight be given to the Secretary's determination; it is merely objecting to the fact that it has not been allowed to question it. It may be that upon the argument as to coverage the question would

arise as to the weight to be given to any determination by the Secretary, but we are here objecting to the fact that the Corporation was not allowed to question it. The District Court has not been told what weight is to be given to any finding of the Secretary but has been told to treat it as final and irrefutable.*

However, if we look at the situation realistically there is no administrative fact-finding; as yet, in the case at bar. The Secretary's complaint sets forth that the Corporation entered into certain contracts for shoes with the Government, that in addition to its shoe factories it owns certain other plants, that in these plants it charges that some employees received less than the permissible minimum wages, that the Secretary has reason to believe that these employees were employed by the Corporation in performance of the Government contracts, that the Corporation has in its possession records that will show what compensation these employees received, that the Corporation has refused to produce those records and that the Secretary wants those records so that she can proceed to make determinations—which determinations, she points out, will, after being made, be conclusive in any Court of the United States if supported by the preponderance of the evidence (R. 2-7). Clearly, the Secretary has made no determinations, and it is difficult to see what those "specialists, advised by experts" could have done in this situation. In truth and in fact, the Secretary wanted merely to see if she could push the Act to cover not only the plant in which the goods contracted for were made but also the plant where were made the materials

*It should be noted that under the Act, the findings of the Secretary even after hearings are not made conclusive on the Courts unless supported by the preponderance of the evidence.

that went into those goods. All that the Secretary had done when she went into the District Court was to make charges; the only findings made were those made by the District Court. This case has still not reached a point where the Secretary has made findings; even then, we are not here arguing about the weight of any findings but as to their incontestability.

V

THE ACT DOES NOT APPLY TO THE MANUFACTURE OF LEATHER, RUBBER GOODS, COUNTERS AND CARTONS UNDER CONTRACTS FOR THE SALE OF SHOES.

The District Court found that the manufacture of leather, rubber goods and cartons was manufacture for stock not specifically for Government contracts (R. 282). This constitutes a finding of fact by the Trial Court which should not be disturbed unless it is clearly "erroneous" (Rules of Federal Procedure, Rule 52), *Warren v. Keep*, 155 U. S. 265 (1894), *Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co.*, 204 Fed. 166 (C. C. A. 8th, 1913), cert. den. 229 U. S. 624. The rule of finality as to Trial Court findings of fact is applied in summary proceedings as well as in actions, *Macomber v. Hudspeth*, 115 F. (2d) 114 (C. C. A. 10th, 1940). The rule represents a practice that has long prevailed, *United States v. Still*, 120 F. (2d) 876 (C. C. A. 4th, 1941). It should not, therefore, be held that the Act applies to the corporate petitioner unless the finding of the Trial Court is demonstrated to be clearly erroneous. As we hereinafter show, the finding by the Trial Court not only accords with the

rulings of the Department of Labor under this very Act, announced at the time these contracts were being performed, but on the evidence is the only permissible conclusion.

(a) *Rulings of the Department.* During the period from October, 1936 until October, 1938 when these contracts were being performed by the corporate petitioner, the Department issued only two rulings concerning the coverage of the Act. The first ruling was in the form of a letter dated December 30, 1936, two months after the commencement of work by the corporate petitioner on the Government contracts in question (Ex. 4d, R. 198). This letter was written by the Acting Administrator of the Act to the International Harvester Company and was approved by the Acting Secretary of Labor. The Harvester Company had a number of contracts with the Government for the sale and delivery of trucks and maintained factories for the manufacture of trucks and also maintained factories for the manufacture of various parts which were later used in assembling the trucks at the truck factories. The Harvester Company asked the Department whether the factories for the manufacture of parts were subject to the Act. The Department ruled that those factories were not subject to the Act, stating in part:

"Inasmuch as Congress limited the scope of the Act to manufacture of the articles required under the Government contract, your company would be complying with the Act on truck contracts if the truck factories were operated in conformity with the law."

The situation there ruled on was even stronger than the case at bar for there the parts manufactured could only

be used in specified trucks whereas here the leather or the rubber heels and cartons could be used in any footwear. From the date of this ruling until after the last contract had been partially performed by the corporate petitioner, only the records of the footwear factories were inspected or checked (R. 247) and no demand or request was made for the records of any other factory or plant.

The second ruling did not come to the petitioner's attention during the performance of these contracts. It concerns, however, the casting of ingots in the open hearth department of the Baldwin Locomotive Works. This ruling is also in the form of a letter dated January 9, 1937 (Ex. 4b, R. 189) and states:

"* * * except as to those instances where the production of ingots is part of an uninterrupted process of manufacture in the case of Government goods, the employees in the open hearth department are not subject to the Walsh-Healey Act."

The production by the corporate petitioner of leather, rubber soles and heels, cut soles, counters and cartons is not a part of an uninterrupted process of manufacture of shoes in the case of Government footwear contracts. The leather, rubber soles and heels, cut soles, counters and cartons were not manufactured specifically for Government use. They were manufactured, primarily for civilian purposes and from such manufactured stock a small portion was later selected which was suitable for use in the manufacture of Government footwear (R. 141-143, 158, 159, 165, 166, 255).

These two rulings comprise the only rulings made by the Department until long after all the contracts in question were fully and completely performed. It is clear,

therefore, that the officials charged with the administration of this Act did not consider that it covered the manufacture of leather, rubber soles and heels, cut soles, counters and cartons by the corporate petitioner. It is well settled that the contemporaneous interpretation of a statute by those charged with its enforcement is entitled to great weight: *United States v. Jackson*, 280 U. S. 183 (1930), *Brewster v. Gage*, 280 U. S. 327 (1930); *United States v. American Trucking Association*, 310 U. S. 534 (1940), *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U. S. 349 (1941).

Respondent has laid great stress on the subject of integrated industries, such as Endicott Johnson Corporation, stating that in such case all of the processes incident to the manufacture of the finished product are covered by the provisions of the Act. Under the rulings in effect at the time of the performance of the contracts in question no mention was made of integrated industries. It was not until the promulgation of the "Rulings and Interpretations No. 2", issued September 29, 1939, almost a year after the performance of the last contract, that integrated industries were referred to and a specific provision inserted holding all of the processes performed by such integrated industries to be covered by the provisions of the Act.

The failure of the Division to exercise a power which it would presumably be alert to exercise if it felt it possessed, should have great weight in determining whether or not the Act applies to the factories and plants in question and especially in view of the fact that almost three years elapsed from the time the corporate petitioner commenced work on the contracts in question before any official ruling of the Department was made holding the factories and plants in question to be covered.

The petitioner from time to time signed the contracts with the Government in the reasonable and justified belief that their representations and stipulations applied only to the factories in which the shoes were made.

(b) *Classification of Industries under Other Federal Acts.* The manufacture of footwear has always been classified and defined as separate and distinct from the manufacture of leather, the manufacture of rubber and the manufacture of paper cartons.

The Bureau of Census of the United States Department of Commerce in its census of manufacturers for the years 1935 and 1937 and in its preliminary report for 1939, classifies and defines the tanning and leather industry (other than rubber) and the foot and shoe cut stock and findings industry as separate and distinct industries (Exs. D, E and F, R. 269, 271, 273).

The Administrator of the Fair Labor Standards Act of 1938 has defined the shoe manufacturing and allied industries as a separate and distinct industry from the tanning of leather or the manufacture of rubber soles and heels (Ex. C, R. 268). A wage order applicable to the rubber products manufacturing industry became effective July 28, 1941. One for the leather industry became effective September 16, 1940.

Under this very Act a minimum wage has been established by the Secretary of Labor for the men's welt shoe industry (Ex. B, R. 267) and as a separate and distinct industry a minimum wage has been established for the leather industry (effective December 17, 1941).

Under the National Industrial Recovery Act a code of fair competition was established for the boot and shoe manufacturing industry and as the industry was therein

defined it did not include the tanning of leather or the manufacture of rubber soles and heels (Ex. G, R. 273). A code of fair competition was established also for the leather industry and as the industry was therein defined it did not include the manufacture of boots and shoes or the manufacture of rubber soles and heels (Exs. H and I, R. 274, 275). A code for the rubber manufacturing industry did not include the manufacture of boots and shoes or the manufacture of leather (Ex. J, R. 276).

From the foregoing definitions of industries, it is apparent that the Act cannot be held, and was not intended, to apply to the corporate petitioner's operations in its tanneries, manufacturing leather, or to its rubber plants and mills, manufacturing rubber heels and soles.

None of the foregoing definitions of industries include the manufacture of cartons. Their manufacture is part of the paper box manufacturing industry (R. 254).

(c) *The Processes in Question are not Normally Associated with Footwear Manufacture.* In determining what is the practice in an industry, the entire industry must be looked at. In the United States there are approximately 1,000 shoe manufacturers. In the vast majority of cases, these shoe manufacturers purchase their leather, and rubber soles and heels, and cut soles, counters and cartons from outside suppliers and confine their operations chiefly to the assembling and fabrication of the materials into the finished product (R. 254). At most there are not more than three or four manufacturers of shoes in the United States who, in addition to manufacturing the shoes, also tan their own leather, make their own rubber soles and heels, cut soles, counters and cartons. Therefore, looking at the industry as a whole, those processes are not normally or

usually part of the shoe manufacturing industry. They are entirely separate and distinct. There is, therefore, no factual basis for the respondent's view that the manufacture of leather, the manufacture of rubber soles and heels, the manufacture of cut soles, counters and cartons are part of the usual process of shoe manufacture.

Respondent also maintains that the construction of the Act urged by the petitioners would defeat the purpose of the Act by restricting its benefits to the employees engaged in the final process of manufacture and that the contractor could avoid the Act by physically segregating those employees in a separate department away from those engaged in the processes antecedent to the final fabrication. The corporate petitioner has been operating its tanneries, rubber mills, sole cutting, counter and carton factories and plants as separate and distinct factories and plants since its incorporation in 1919 and no change was made in such operations prior to or subsequent to the enactment of the Walsh-Healey Public Contracts Act. Where the Contractor physically segregates the employees solely for the purpose of evading the impact of the Act the Contractor manifestly is employing a subterfuge which the Department can deal with in that situation when and if that situation arises.

(d) *A Very Small Percentage of Corporate Petitioner's Leather and Rubber was Used under the Contracts in Question.* During the period involved, only 16.2% of the upper leather produced by Endicott Johnson Corporation in its upper leather tanneries was used on Government contracts; only 4.2% of the upper leather produced in its calfskin tannery was used on Government contracts; only 4.9% of sole leather produced in its sole leather tannery was used on

Government contracts and only 3.4% of the rubber soles and heels produced in its rubber plants were used on Government contracts. In other words, from 84% to 97% of its production in tanneries and rubber plants was for commercial purposes (R. 222, 223, 224, 225, 226, 227, 255).

(e) *Application of the Act to Corporate Petitioner's Leather, Rubber and Carton Factories Would be Arbitrary and Unreasonable.* The regulations of the Department under the Act require separate records for employees engaged in the manufacture of goods sold under Government contract to those not so engaged.

It is impossible to separate the employees who produced leather, rubber heels and soles to be used in Government shoes under the contracts in question from those who produced the leather, rubber heels and soles to be used for commercial purposes during the period of the contracts in question, (1) because the leather which is used for leather soles on Government shoes is not selected until the cut soles have been sorted and graded as to defects and sizes, (2) because the hides which are to be used for upper leather in Government shoes are not finally selected until the same have been completely tanned, and (3) because the rubber heels and soles for the Government shoes are not selected until they have been sorted and graded as to defects and sizes (R. 255). Therefore, the regulation which would require separate payroll records to be kept for employees engaged in Government work as to these processes is impossible of performance (R. 255, 256). For example, a man spends a day in tanning leather—is he engaged in Government work? No one can possibly know until long afterwards when that leather or any part of it will at a different factory be put into footwear.

The standard form of bid under the Act is significant. The form provides:

"Bidders must state in space provided below names and locations of the factories where manufacture of the item bid upon will be performed" (Ex. 1b, R. 177).

The corporate petitioner, in response to this provision, listed the factories at which the shoes were to be manufactured. The first contract between the Government and the corporate petitioner was made and performed in the fall of 1936. The respondent had inspectors at the factories listed by the corporate petitioner. The inspectors of course knew, or soon found out, that articles used in the manufacture "of the item bid upon" were manufactured in other factories. However, no question was raised as to the listing of factories in subsequent contracts nor did inspectors appear at any factories except the shoe factories.

The attempted application of the Act by the respondent is arbitrary and unreasonable.

(f) *The Manufacture of Leather, Rubber Soles and Heels, Cut Soles, Counters and Cartons Constitutes Manufacture for Stock.* During the period from 1936 to 1938, when the contracts in question were being performed, the production of leather, rubber soles and heels, counters and cartons were in reality production for stock, as distinguished from production of materials for use in the contract. From the Record, it definitely appears that there is no selection of leather for Government use at any time during the sole leather tanning process. The leather is completely tanned and sent to the stock room and when a supply of sole leather

is needed for Government shoes, it is ordered from the stock room according to thickness. There could be no clearer example of a manufacture for stock than that illustrated by the manufacture of sole leather (R. 157-165).

In the case of upper leather no selection is made during the tanning process for Government uses until the so-called blue stage and the selections made at that stage and thereafter are only tentative selections of hides which may be suitable for Government use (R. 137-155). What is true with respect to sole leather and upper leather is likewise true with respect to rubber plants making soles and heels (R. 255), the sole cutting departments (R. 159), the counter and carton departments (R. 165). None of these materials can realistically be said to be manufactured for anything except stock. The District Court, upon the facts produced at the hearing before it, correctly held:

"I can place no other construction on the operations than that of manufacture for stock. I am unable to differentiate between a man going to a stock pile and selecting certain articles and a man standing at the tail end of an operation and making a selection of the same articles before they are piled. I think both operations mean selection from stock."
(R. 282)

CONCLUSION

The order of the Circuit Court of Appeals for the Second Circuit should be reversed and the order of the District Court for the Northern District of New York should be affirmed.

Respectfully submitted,

HOWARD A. SWARTWOOD,
WILLIAM H. PRITCHARD,
Attorneys for Petitioners.

EDWARD H. GREEN,
JOHN C. BRUTON,
Of Counsel.

October, 1942.

49
APPENDIX

[PUBLIC—No. 846—74TH CONGRESS]
[S. 3055]

AN ACT

To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all of the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

12

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work of part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of \$10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the

Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the con-

tractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for other purposes", approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Approved, June 30, 1936.

FILE COPY

Office - Supreme Court, U. S.

FILED

NOV 19 1942

CHARLES ELMORE SIMPLEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 142

ENDICOTT JOHNSON CORPORATION, a corporation,
and HOWARD A. SWARTWOOD, Secretary,
Endicott Johnson Corporation,

Petitioners,

against

FRANCES PERKINS, Secretary of Labor of the United
States,

Respondent.

REPLY BRIEF FOR PETITIONERS

✓ HOWARD A. SWARTWOOD,
✓ WILLIAM H. PRITCHARD,
Attorneys for Petitioners.

✓ EDWARD H. GREEN,
JOHN C. BRUTON,
◦ *Of Counsel.*

November, 1942.

CONTENTS:

PAGE

I. THE POWER OF THE DISTRICT COURT.....	1
II. COVERAGE	6
III. CONCLUSION	8

CITATIONS:

<i>Hale v. Henkel</i> , 201 U. S. 43 (1906).....	5
<i>Interstate Commerce Commission v. Brimson</i> , 154 U. S. 447 (1894)	5
<i>Fleming v. Montgomery Ward & Co.</i> , 114 F. (2d) 384 (C. C. A. 7th, 1940), cert. den. 311 U. S. 690	5-6
<i>Cudahy Packing Co. v. Fleming</i> , 119 F. (2d) 209 (C. C. A. 5th, 1941) rev'd on other grounds, <i>Cudahy Packing Co. v. Holland</i> , 315 U. S. 357...	6
<i>National Labor Relations Board v. Barrett Co.</i> , 120 F. (2d) 583 (C. C. A. 7th, 1941).....	6
<i>President v. Skeen</i> , 118 F. (2d) 58 (C. C. A. 5th, 1941)	6
<i>Graham v. Federal Tender Board No. 1</i> , 118 F. (2d) 8 (C. C. A. 5th, 1941).....	6
<i>United States v. Clyde Steamship Co.</i> , 36 F. (2d) 691 (C. C. A. 2nd, 1929), cert. den. 281 U. S. 744	6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

ENDICOTT JOHNSON CORPORATION, a corporation, and HOWARD A. SWARTWOOD, Secretary, Endicott Johnson Corporation,

Petitioners,

against

FRANCES PERKINS, Secretary of Labor of the United States,

Respondent.

No. 142

REPLY BRIEF FOR PETITIONERS

I.

THE POWER OF THE DISTRICT COURT.

Respondent says (Res. Br., pp. 17-18) that the defenses (i) of incrimination, (ii) that the subpoena is too vague and unreasonable, (iii) that the hearing is not of the kind authorized by the statute, (iv) that the subpoena is issued by one not having the authority, and (v) that the material called for does not relate to a lawful subject of inquiry, can be made and that therefore the Court does not perform a ministerial function and the constitutional prohibitions of Article III and the Fourth Amendment do not apply.

Point (i) rests upon a wholly unrelated constitutional prohibition, the prohibition against a witness being compelled to testify against himself (which does not apply to

corporations, and is not applicable to the issuance of subpoenas). Points (ii) and (iv) relate to cases where the defense sometimes, but not always, appears upon the face of the subpoena. Points (iii) and (v) require for their determination consideration of the hearing, of the statute and of the subpoenaed material. The respondent, however, urges that the District Court must determine whether the evidence sought by the subpoena is germane to a lawful subject of inquiry "on the pleadings". Thus, the very question at issue in the case at bar is whether the District Court is limited to "the pleadings" in its determination of whether the evidence sought is germane to a "lawful subject of inquiry". If the District Court may not look beyond the pleadings or beyond the face of the subpoena, when called upon to enforce an administrative subpoena, Article III and the Fourth Amendment to the Constitution are directly at issue.

The very authorities respondent cites require, in respondent's own language, that "to an application for the enforcement of a subpoena appropriate defense may be made"; but to this respondent adds, without authority, that this defense is limited to what appears "on the pleadings". Respondent does not even claim that there are such limitations in the authorities upon which she relies, and her qualification "on the pleadings" goes to the basis of the judicial process. It makes the action to be taken depend upon matters of form and not upon matters of substance.

This is brought out by respondent's own admission that if on these pleadings respondent had sought a list of petitioner's stockholders the request would have been properly denied; but, on respondent's own argument, respondent by

merely changing her pleadings could have gotten the list of stockholders, since respondent claims that the Court could not go back of the pleadings. Hence, whether the Court would have to order the production of the list of petitioner's stockholders would not depend upon the decision of any question of law or of fact but merely upon how the respondent worded her papers. When a court must act merely because of the allegations of a party, then neither of the requirements of Article III or the Fourth Amendment are met.

The Act has given the Secretary jurisdiction to inquire into violation of certain provisions of a contract calling for the manufacture of shoes at specified factories. The Secretary asserts jurisdiction to examine into the facts of employment in the manufacture of calfskin at another factory. Whether this latter assertion of jurisdiction is well founded can or cannot be determined by the Court, according to respondent, depending upon what the Secretary says in her application for the subpoena. If the Secretary had no jurisdiction to inquire into the calfskin factory, then that is certainly a defense that may appropriately be made within the decisions cited by respondent. But respondent urges that if the Secretary in her application uses the right words to assert her jurisdiction, then this appropriate defense may not be made. In other words, respondent claims that this Court was not establishing rules of substance but merely rules of pleading.

The argument of the respondent (Res. Br. pp. 20-21) that since an administrative proceeding cannot be enjoined by a defendant therein a subpoena must be enforced against it, irrespective of its defenses thereto, is dealt with in our main brief (pp. 34-35). However, it should be noted

that the respondent attempts to prove too much because the hearing could not be enjoined even for the defenses to the enforcement of a subpoena which it itself says might be maintained.

The argument based upon "the function of an auxiliary court" does not help respondent. The cases to which she refers are necessarily those in which one court was acting in aid of another court and the whole proceeding thus was judicial in its nature and the parties had the protection of the court and of judicial rules. Furthermore, respondent cited no case to the effect that in an action at law for breach of the provisions of a contract to manufacture shoes in specified factories the plaintiff could get a discovery in equity of conditions in a distinct calfskin factory without satisfying the court of the connection between the two. The equity court would exercise the judicial function in determining how far it would permit interrogatories, and while it might in the exercise of that function incline toward liberality there would be a point beyond which it would not go.* Furthermore, this is all basically different from an administrative officer, with limited powers, asserting that a court to which he applies for assistance in an alleged usurpation of power may not hear the claim of usurpation.

The analogy to Grand Jury investigations does not help respondent, as this Court has pointed out that the Grand

*The respondent admits (Res. Br. pp. 21 and 23) that the "auxiliary" court will determine "relevancy". The application for the subpoenas *duces tecum* in the case at bar alleges that the material subpoenaed is "relevant, material and necessary" (R. 7). This allegation is denied (R. 14) but under the contention of the respondent, and exactly in accord with the reasoning in her brief, the District Court would be required to accept without inquiry the allegation that the material is "relevant, material and necessary". Thus the respondent refutes her own argument.

Jury historically is *sui generis*. Even so, this Court has held, as pointed out by us in our main brief (p. 26), that the subpoena *duces tecum* issued in a Grand Jury proceeding is subject to the Fourth Amendment. *S. Hale v. Henkel*, 201 U. S. 43 (1906).

It is noteworthy that respondent in no place addresses any argument to the intent of Congress. As we have pointed out, Section 5 of the Walsh-Healy Act was passed by Congress following the pattern of various other statutes with a line of judicial interpretation going back to *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 (1894). If Congress had intended that in the enforcement of this Act, the Secretary should have any other or greater powers of subpoena, or that the District Court should exercise a different type of jurisdiction than had been customary, surely there would have been some reflection of it in the statute. Without admitting that Congress could give the Secretary the subpoena power and could limit the jurisdiction of the District Court, as held by the Circuit Court of Appeals, we argued that such was not the proper construction of the statute. Respondent has limited her argument to what she believes Congress could do or what an administrative officer would like Congress to do, and not to what Congress has done.*

The decision of the Circuit Court of Appeals is unprecedented and the cases cited by the respondent (Res. Br. pp. 27-28) do not support it. *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7th, 1940), cert.

*The respondent urges that the action of the District Court operates "to forestall" (Res. Br. p. 27) the Secretary's judgment. It should be observed, however, that the District Court has acted at the Secretary's own invitation. She instituted the proceedings and asked the District Court to act.

den. 311 U. S. 690; *Cudahy Packing Co. v. Fleming*, 119 F. (2d) 209 (C. C. A. 5th, 1941), rev'd on other grounds, *Cudahy Packing Co. v. Holland*, 315 U. S. 357; were cases where the subpoena was objected to because no specific violation of the statute was charged. *National Labor Relations Board v. Barrett Co.*, 120 F. (2d) 583 (C. C. A. 7th, 1941); involved the question of whether a subpoena might be issued on an investigation as distinct from whether a subpoena might be issued only after a complaint had been served. *President v. Skeen*, 118 F. (2d) 58 (C. C. A. 5th, 1941), held that an oil company was subject to the Connally Act, though it did not itself transport oil in interstate commerce, because it might sell or deliver oil that would be transported in interstate commerce. *Graham v. Federal Tender Board No. 1*, 118 F. (2d) 8 (C. C. A. 5th, 1941), involved only a question of procedure and has nothing whatsoever to do with the issues in the case at bar. *United States v. Clyde Steamship Co.*, 36 F. (2d) 691 (C. C. A. 2nd, 1929), cert. den. 281 U. S. 744, involved a question of rebates under the Interstate Commerce Act and does not pertain in any way to the issues in the case at bar. The District Court decisions, cited by the respondent, are equally irrelevant or do not support the respondent.

II.

COVERAGE.

The opinion of the Court below stated that the Court "inclined" to believe that the testimony taken by the District Court proved the fact of coverage. However, it specifically stated that "we have not gone into that matter"

(R. 303). Since the opinion of the Court states expressly that the Court had not gone into the question of coverage, the statement that it was "inclined" to believe that coverage existed cannot be given weight.

The respondent states that Section 1(e) "is not limited to employees of the contractor itself" (Res. Br. p. 31) but applies "where part of the manufacturing process is carried on by subcontractors". Section 1(e) differs from the remaining subsections of Section 1 of the Act in that it states "no part of such contract" will be performed or any of the materials, etc. be manufactured "or fabricated" in plants not meeting the sanitary or hazardous conditions prescribed by the section. The Regulations issued by the Secretary in 1937 (R. 179-180) recognize this difference and state that while subsections (a), (b), (c) and (d) of Section 1 do not apply to subcontractors, subsection (e) does so apply. This very ruling therefore confirms the construction of the Act for which we contend. The ruling by the Secretary was that the language of subsection 1(e) was sufficiently broad to include subcontractors who furnished supplies and materials to the contractor but subsections 1(b) and 1(c) were not sufficiently broad to include subcontractors. Since the distinction in the language of the Act is not that of a contractor or subcontractor, but is based upon the work done, clearly tanning leather, manufacturing rubber heels and soles, manufacturing of counters and cartons might come within Section 1(e) but not within Sections 1(b) and 1(c).

The rulings and regulations concerning "integrated" industries referred to by respondent (Res. Br. pp. 33-35) were all *after* the contracts involved in the case at bar were completed. The respondent is mistaken in stating that its rulings at the time the contracts in question were being

performed (i.e., its rulings in *International Harvester Company* and *Baldwin Locomotive Works*) related to stocks on hand at the time contracts with the Government were performed. Those rulings were not so limited and indeed, by implication, made clear that they related to stocks produced subsequent to the time at which the Government contracts were entered into.

We of course do not contend as respondent seems to believe (Res. Br. p. 38), that the definitions of industries by the Census Bureau, the Wage and Hour Division of the Fair Labor Standards Act and the National Industrial Recovery Act are binding under this Act. We submit, however, that they are clearly pertinent guides in the construction of the Act.

III.

CONCLUSION.

The order of the Circuit Court of Appeals for the Second Circuit should be reversed and the order of the District Court for the Northern District of New York should be affirmed.

Respectfully submitted,

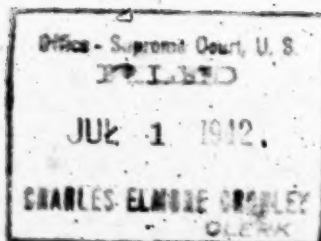
HOWARD A. SWARTWOOD,
WILLIAM H. PRITCHARD,
Attorneys for Petitioners.

EDWARD H. GREEN,
JOHN C. BRUTON,
Of Counsel.

November, 1942.



FILE COPY



No. 142

In the Supreme Court of the United States

OCTOBER TERM, 1942

ENDICOTT JOHNSON CORPORATION, A CORPORATION,
AND HOWARD A. SWARTWOOD, SECRETARY, ENDI-
COTT JOHNSON CORPORATION, PETITIONERS

v.

FRANCES PERKINS, SECRETARY OF LABOR OF THE
UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 142

ENDICOTT JOHNSON CORPORATION, A CORPORATION
AND HOWARD A. SWARTWOOD, SECRETARY, ENDI-
COTT JOHNSON CORPORATION, PETITIONERS

v.

FRANCES PERKINS, SECRETARY OF LABOR OF THE
UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The court below held that, in a proceeding to enforce an administrative subpoena, the courts should not make an independent determination of the "jurisdiction" of the administrative agency issuing the subpoena. The decision, we believe, is clearly correct. In view of the manifest importance of the question, however, and the apparent conflict with the recent holding of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco and Grocery Co. v. Fleming*, 125 F. (2d) 596,

(1)

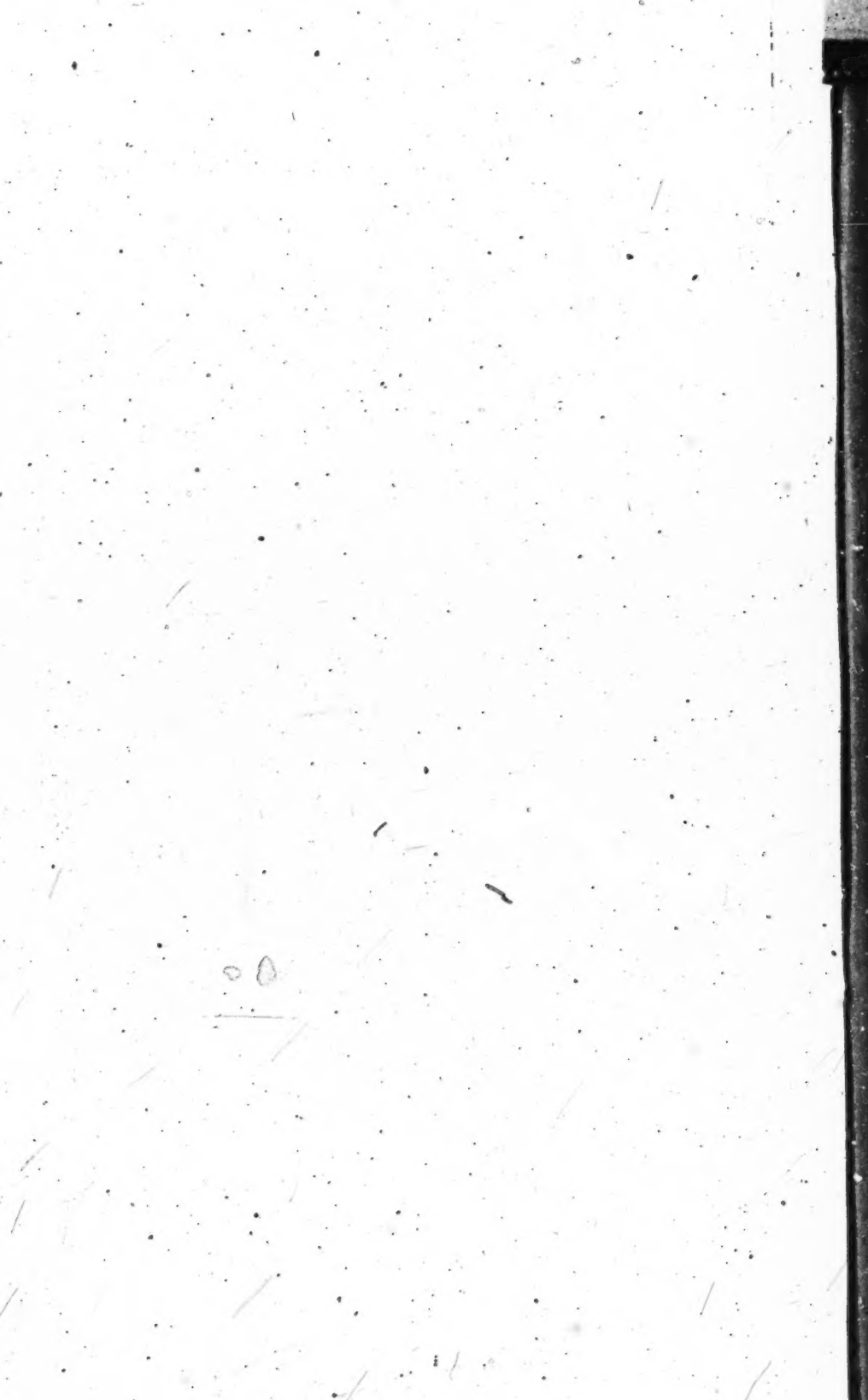
decided February 5, 1942, the Government does not oppose the granting of the petition for a writ of certiorari.¹

Respectfully,

CHARLES FAHY,
Solicitor General.

JUNE 1942.

¹ The question here presented was argued but not passed upon in *Cudahy Packing Co. v. Holland*, No. 245 last Term, decided March 2, 1942.



FILE COPY

NOV. 14 1942

CHARLES E. ROSE, CLERK

No. 142

2

In the Supreme Court of the United States

OCTOBER TERM, 1942

ENDICOTT JOHNSON CORPORATION, A CORPORATION,
AND HOWARD A. SWARTWOOD, SECRETARY, ENDI-
COTT JOHNSON CORPORATION, PETITIONERS

v.

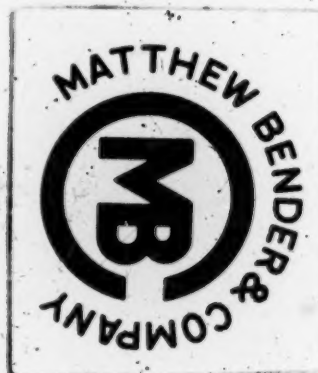
FRANCIS PERKINS, SECRETARY OF LABOR OF THE
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

MICRO CARD **22**
TRADE MARK **®**

42



248

2

64



INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes involved.....	2
Statement.....	2
Summary of argument.....	14
Argument:	
I. The district court should not have determined in this proceeding whether the employees in question are within the coverage of the Public Contracts Act.....	16
II. On the undisputed facts appearing from the pleadings, and confirmed by the evidence, the persons employed by petitioner in the factories and departments in controversy are within the coverage of the Act.....	29
Conclusion.....	38
Appendix.....	39

CITATIONS

Cases:

<i>Acme Card System Co. v. Remington Rand Business Service</i> , 9 F. Supp. 1001.....	22
<i>Belding-Corticelli Limited v. Kaufman</i> , 10 F. Supp. 991.....	22
<i>Berke v. United Paperboard Co.</i> , 26 F. Supp. 412.....	24
<i>Blair v. United States</i> , 250 U. S. 273.....	21, 25
<i>Boyd v. United States</i> , 116 U. S. 616.....	17
<i>Boysell Co. v. Colonial Coverlet Co.</i> , 29 F. Supp. 122.....	24
<i>Brown v. United States</i> , 276 U. S. 134.....	21
<i>Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.</i> , 139 Fed. 843.....	22
<i>Cobbledick v. United States</i> , 309 U. S. 323.....	25
<i>Cudahy Packing Co. v. Fleming</i> , 119 F. (2d) 209, reversed on other grounds, <i>sub. nom. Cudahy Packing Co. v. Holland</i> , 315 U. S. 357.....	27
<i>Cudahy Packing Co. v. Fleming</i> , 122 F. (2d) 1005, reversed on other grounds, <i>sub. nom. Cudahy Packing Co. v. Holland</i> , 315 U. S. 785.....	28
<i>Cudahy Packing Co. v. Holland</i> , 315 U. S. 357.....	17
<i>Cudahy Packing Co. v. National Labor Relations Board</i> , 117 F. (2d) 692.....	10
<i>Dowagiac Mfg. Co. v. Locken</i> , 143 Fed. 211.....	22
<i>Ellis v. Interstate Commerce Commission</i> , 237 U. S. 434.....	17
<i>Esgee Company v. United States</i> , 262 U. S. 151.....	21
<i>Federal Communications Commission v. Pottsville Broadcasting Co.</i> , 309 U. S. 134.....	25

II

Cases—Continued.

	Page
<i>Federal Power Commission v. Metropolitan Edison Co.</i> , 304 U. S. 375.....	20
<i>Federal Power Commission v. Peoples Natural Gas Co.</i> , decided September 17, 1941 (D. D. C.).....	28
<i>Fleming v. Davidson Lumber Co.</i> , 3 Wage Hour Rept. 526....	28
<i>Fleming v. G & C Novelty Shoppe, Inc.</i> , 35 F. Supp. 829....	28
<i>Fleming v. Montgomery Ward & Co.</i> , 114 F. (2d) 384, certiorari denied, 311 U. S. 690.....	27
<i>Fox v. House</i> , 29 F. Supp. 673.....	24
<i>General Tobacco and Grocery Co. v. Fleming</i> , 125 F. (2d) 596.....	28
<i>Goodyear Tire & Rubber Co. v. National Labor Relations Board</i> , 122 F. (2d) 450.....	10
<i>Graham v. Federal Tender Board No. 1</i> , 118 F. (2d) 8.....	28
<i>Gray v. Powell</i> , 314 U. S. 402.....	27
<i>Hale v. Henkel</i> , 201 U. S. 43.....	17
<i>Harriman v. Interstate Commerce Commission</i> , 211 U. S. 407.....	17
<i>Indianapol. Amusement Co. v. Metro-Goldwyn-Mayer D. Corp.</i> , 90 F. (2d) 732.....	23
<i>Lane Cotton Mills v. Perkins</i> , No. 8433, decided October 15, 1940 (D. D. C.).....	25
<i>Lewis v. United Air Lines Transport Corp.</i> , 27 F. Supp. 946.....	24
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U. S. 41.....	17, 20
<i>National Labor Relations Board v. Barrett Co.</i> , 120 F. (2d) 583.....	28
<i>National Labor Relations Board v. New England Transportation Co.</i> , 14 F. Supp. 497.....	28
<i>National Mediation Board v. Virginian Ry. Co., Pike & Fisher</i> , Admin. Law, 44g.31-4.....	28
<i>Perkins v. Lukens Steel Co.</i> , 310 U. S. 113.....	25, 31
<i>Perry v. Rubber Tire Wheel Co.</i> , 138 Fed. 836.....	22
<i>President v. Skoen</i> , 118 F. (2d) 58.....	28
<i>Randall, Matter of</i> , 90 App. Div. 192, appeal dismissed, 177 N. Y. 450.....	22
<i>Robus & Co., Inc. v. American Founders Corp.</i> , 8 F. Supp. 97.....	22
<i>Rochester Telephone Corp. v. United States</i> , 307 U. S. 125....	27
<i>Sinclair Refining Co. v. Jenkins Co.</i> , 289 U. S. 689.....	23, 24
<i>South Chicago Coal & Dock Co. v. Bassett</i> , 309 U. S. 251....	27
<i>Sulzbacher v. Travelers Ins. Co.</i> , 6 Fed. Rules Serv. 36a, 41....	24
<i>Tucker v. Peiler</i> , 207 Fed. 570, certiorari denied 265 U. S. 587.....	22
<i>United States v. Clyde S. S. Co.</i> , 36 F. (2d) 691, certiorari denied, 281 U. S. 244.....	28
<i>Voehl v. Indemnity Ins. Co.</i> , 288 U. S. 162.....	27
<i>Warner, Lansing B., Inc., v. Lehigh Valley R. Co.</i> , 75 F. (2d) 483.....	23
<i>Wilson v. United States</i> , 221 U. S. 361.....	21

Statutes:

Page

Walsh-Healey Public Contracts Act, 49 Stat: 2036 (41
U. S. C. 35-45):

Sec. 1	30, 31, 39
2	25, 41
3	25, 42
4	42
5	18, 25, 43
6	44
7	45
8	45
9	46
10	46
11	46

Miscellaneous:

Attorney General's Committee on Administrative Procedure, Monograph No. 1, pp. 15-22	24
Federal Rules of Civil Procedure:	
Rule 26 (b)	23
Rule 30 (d)	23
Rule 45	23
Note (1941) 8 U. of Chicago L. Rev. 592	10
2 Pike & Fischer, <i>Federal Rules Service</i> , 511	10

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 142

ENDICOTT JOHNSON CORPORATION, A CORPORATION,
AND HOWARD A. SWARTWOOD, SECRETARY, ENDI-
COTT JOHNSON CORPORATION, PETITIONERS

v.

FRANCES PERKINS, SECRETARY OF LABOR OF THE
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the District Court (R 55, 278) are reported in 37 F. Supp. 604 and 40 F. Supp. 254. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 298-332) is reported in 128 F. (2d) 208.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 22, 1942 (R. 333). The peti-

tion for a writ of certiorari was filed on June 11, 1942, and was granted October 12, 1942. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a district court must determine whether particular plants of a contractor subject to the Walsh-Healey Public Contracts Act are within the coverage of the Act before enforcing an administrative subpoena requiring the production of records relating to those plants.

2. Whether employees of an integrated shoe company, who work in plants in which are processed and prepared the leather soles, rubber heels, counters and cartons for use in performance of a Government contract for the manufacture of footwear, are covered by the wage and hour provisions of the Walsh-Healey Public Contracts Act.

STATUTES INVOLVED

The pertinent provisions of the Walsh-Healey Public Contracts Act, 49 Stat. 2036 (41 U. S. C. 35-45), are set forth in the Appendix, *infra*, pp. 39-46.

STATEMENT

On October 6, 1939, the Endicott Johnson Corporation was served with an administrative complaint issued by the Division of Public Contracts

of the United States Department of Labor charging that the company had violated certain provisions of the Act of June 30, 1936, 49 Stat. 2036, known as the Walsh-Healey Public Contracts Act (R. 42). On or about November 16, 1939, an amended complaint was served in the same proceeding (R. 42, 209-222), and on or about November 26, 1939, Endicott Johnson filed its answer to the amended administrative complaint (R. 42-43; 24-34). On December 7, 1939, petitioners, Endicott Johnson Corporation and Howard A. Swartwood, its Secretary, were served with subpoenas *duces tecum* issued by the Secretary of Labor, directing them to produce certain wage and hour records and books at an administrative hearing to be held on December 13, 1939, before an Examiner of the Division of Public Contracts (R. 8-9, 10-11). At the hearing petitioners refused to obey the subpoenas as to the books and records of certain of the Endicott Johnson factories. (R. 6-7, 13, 43) and the administrative hearing was adjourned pending a court proceeding to enforce the subpoenas (R. 260-261).

Thereupon, on January 15, 1940, the Secretary of Labor, pursuant to Section 5 of the Walsh-Healey Public Contracts Act, began this proceeding by filing a complaint and application (R. 2-8) in the District Court of United States for the Northern District of New York to obtain an order

directing petitioners to obey the subpoenas issued in the administrative proceeding. The facts alleged in the complaint and application may be summarized as follows (R. 2-8):

Between 1936 and 1938 fifteen contracts were entered into by Endicott Johnson with various executive departments or agencies of the United States for the manufacture or furnishing of certain leather shoes, leather boots, gymnasium shoes, and arctic overshoes (R. 2-3). Each contract was for an amount exceeding \$10,000, and each specifically included the representations and stipulations, required by Section 1 of the Walsh-Healey Public Contracts Act (R. 3), that the contractor would pay his employees engaged in the manufacture or furnishing of the material not less than the minimum wages as determined by the Secretary of Labor pursuant to Section 1 (b) and that those employees would not be permitted to work more than the maximum number of hours established by Section 1 (c).

On December 21, 1937, the Secretary of Labor, in accordance with and under the authority of Sections 1 (b) and 4 of the Act, determined a specific minimum wage for employees engaged in the performance of contracts with agencies of the Government for the manufacture and supply of men's welt shoes. This determination was effective with respect to contracts awarded on or after fifteen

days from December 21, 1937. (R. 3.) Three of the fifteen contracts here involved were awarded more than fifteen days after said date and were affected by the determination (R. 3).

Following an investigation by representatives of the Department of Labor, and it having appeared upon the basis of that investigation that Endicott Johnson had not observed certain provisions of the fifteen contracts and had consequently violated the Walsh-Healey Act, the Secretary of Labor, pursuant to Sections 2 and 5 of the Act, caused an amended complaint, in substitution for an original complaint, to be issued charging Endicott Johnson with breach and violation of certain representations and stipulations in the fifteen contracts, and with violation of certain provisions of the Act and the regulations promulgated thereunder. The violations charged were (1) that at eight of Endicott Johnson factories and departments (tanneries, rubber factory, sole cutting departments, counter department, and carton department) Endicott Johnson, during specified periods, permitted and required persons employed by it in the performance of the fifteen contracts to work in excess of the prescribed maximum hours without paying said employees the prescribed overtime rate for the excess hours as required by the contracts, the Act and the Secretary's regulations thereunder, and (2) that Endicott Johnson refused to pay the pre-

scribed minimum wages to persons employed by it in four of the eight departments and factories in the performance of the three designated contracts. (R. 3-5.)

After an answer to the amended administrative complaint was filed, a hearing upon all matters in issue was commenced before a representative designated by the Secretary, after due notice had been given (R. 4-5). At the direction and order of the Secretary of Labor, subpoenas *duces tecum* were properly executed and served upon petitioners, requiring them to appear and testify at the administrative proceeding, and to bring with them certain books and records. The subpoenas called for "all time cards, time books, employees' wage statements, and payroll records showing the hours worked each day and week by, and the wages paid each wage period to, persons employed by defendant Endicott Johnson Corporation in the factories or departments and for the periods specified in said subpoenas". (R. 6.) Although all of such books, records, cards and statements were in petitioners' custody, petitioners refused to obey so much of the subpoenas as related to cards, books, statements and records covering employees in the eight factories and depart-

ments and for the periods shown in the margin (R. 6-7).¹

The complaint and application alleges also that the Secretary has reason to believe that the persons employed during the specified periods in these eight factories and departments were employed by Endicott Johnson in the performance of the Government contracts and that the records demanded are relevant, material, and necessary to determine whether or not the company has violated the Act and breached its stipulations (R. 5).² It is fur-

¹ The amended administrative complaint charged violations at twelve factories and departments of Endicott Johnson (Plff. Exh: 11, R. 209-222), and the subpoenas called for the books and records of all twelve, but there has been no refusal to obey the subpoenas as to the four factories called "footwear" factories (R. 235, 244):

Calfskin Tannery.....	{ March 22, 1937, to August 11, 1937; March 24, 1938, to June 1, 1938
Upper Leather Tannery.....	{ October 26, 1936, to September 21, 1938
Sole Leather Tannery.....	{ October 26, 1936, to October 11, 1938
Paracord Factory.....	
Sole Cutting Department (Endicott).....	
Sole Cutting Department (Johnson City).....	
Counter Department (Johnson City).....	
Carton Department (Johnson City).....	

² The amended administrative complaint alleged flatly that the persons involved were employed by Endicott Johnson in the performance of the Government contracts (R. 210, 212, 215, 216, 217, 218, 219, 220, 221). The complaint and application alleges that the administrative complaint contains these allegations, and that the Secretary has reason to believe them, but acknowledges that Endicott Johnson denies them (R. 5).

ther alleged that the Secretary of Labor is empowered to make that determination, as well as other relevant determinations, in the administrative proceeding (R. 5).

Petitioners' answer to the complaint and application (R. 11-24), as clarified by a stipulation of counsel (R. 35-36), admits the allegations as to the making and the contents of the contracts (R. 12), as to the steps taken in the administrative proceedings (R. 13), and as to the refusal to comply with the subpoenas (R. 13). It also admits that the eight factories and departments in question were those in which Endicott Johnson's employees tanned most of the leather, cut most of the leather outsoles, middle soles, and inner soles, manufactured all of the rubber heels and soles, all of the counters, and all of the cartons used by the company in the manufacture of the shoes and boots furnished under the fifteen Government contracts (R. 14-15). But the answer denies that the Secretary has reason to believe that the persons employed in these eight factories and departments were employed in the performance of the contracts, or that the records demanded were "relevant, material, and/or necessary to determine any question or matter with respect to the performance" by the company of any of its Government contracts (R. 13, 14, 35-36).

On June 26, 1940, the Secretary of Labor moved for judgment on the pleadings. In the alternative

she moved for summary judgment upon an affidavit by the Solicitor of the Labor Department, who had verified the complaint and application, supporting the allegations of the complaint. As a third alternative, she moved for an order enforcing the subpoenas. (R. 36-40.) The position of the Government was that the answer had raised no real issue as to the Secretary's "reason to believe" that the Public Contracts Act, as a matter of law and fact, covered the factories in question and that the employees had been engaged in the performance of the Government contracts (cf. R. 37-40). In this view, the court was not presently to determine the ultimate question of coverage of the Act. Petitioners, however, contended that the Act could not be construed to cover the tanneries, sole cutting, rubber, carton, and counter factories and that the court should so hold. (Cf. R. 42-55, 54.) No question was raised as to the definiteness or breadth of the subpoenas.

Over six months later, by opinion of February 1, 1941 (R. 55-59), the District Court denied the motions for judgment on the pleadings and for summary judgment on the ground that petitioners had raised an issue "partly factual and partly legal," as to whether the Act covered the eight plants, which issue must be decided by the court after a hearing, since the Secretary had not defi-

nitively determined the issue herself (R. 58).^{*} The court withheld decision on the motion for an order enforcing the subpoenas until after the hearings (R. 59) 37 F. Supp. 604. An order to this effect was entered by the court on February 19, 1941 (R. 63-65), resettling on motion of the Secretary (R. 61-63) a prior order of February 10, 1941 (R. 59-61) which had included a stay of the administrative proceedings and an injunction against the Secretary.

The Secretary thereafter was permitted to amend her complaint and application by adding (1) the unqualified allegation that the employees covered by the records demanded were employed in the "manufacture and furnishing of the materials, supplies, articles and equipment used in the performance of the contracts with the United States," and (2) the allegation that "all the rubber heels and soles, all the counters, all the cartons, and substantially all the cut leather outer soles, middle soles, and inner soles, used by the defendant * * * in the performance" of the Gov-

^{*} The District Court held the proceeding to be a summary one, and not governed by the Federal Rules of Civil Procedure (R. 56), and was in accord with the Secretary's contentions and the cases on the point. See *Cudahy Packing Co. v. National Labor Relations Board*, 117 F. (2d) 692 (C. C. A. 10th); *Goodyear Tire & Rubber Co. v. National Labor Relations Board*, 129 F. (2d) 450 (C. C. A. 6th); Note (1941) 8 U. of Chicago L. Rev. 592; 2 Pike & Fischer, *Federal Rules Service*, 511.

ernment contracts were "manufactured, processed, prepared and produced by persons employed by the defendant" in the eight factories involved (R. 65-66, 67). Petitioners then amended their answer to deny the first added allegation, and to deny the second "except as the same are hereinbefore admitted in this answer" (R. 68). The answer had previously admitted the substance of this allegation (R. 14-15). The Secretary thereupon renewed her motions for judgment on the pleadings and for summary judgment (R. 68).

A hearing was held on April 24 and 25, 1941 (R. 71-171). Evidence was taken, among other matters, as to the structure of Endicott Johnson's operations, the relationship of its various factories, the course of materials through the processes of manufacture, and the point at which selection of materials for use in Government contracts was made. It was brought out clearly, as the pleadings and affidavits indicated, that Endicott Johnson carries on an integrated shoe and boot manufacturing business with several factories, including tanneries, sole cutting, rubber making, counter and carton plants, within an area of a nine mile radius in south central New York. (R. 137-166; cf. R. 14, 25-26, 39.) There was, in addition, uncontradicted support for the proposition that the majority of shoes manufactured for the Government are produced by integrated companies (R. 93-94; Pl. Exs.

7 and 8 for Ident., R. 205, 207).⁴ At the close of this hearing the Secretary moved for judgment on the ground that on the uncontradicted facts the employees covered by the records were within the protection of the Walsh-Healey Act (R. 168-169).

On August 19, 1941, the District Court announced its opinion denying the Secretary of Labor's application for an order enforcing the subpoenas (R. 278-283). The court apparently held that a prior determination by the Secretary that the Public Contracts Act covered the eight plants in question would bind the court, but that no such determination was made here, in which event the court could and would decide the issue of coverage for itself (R. 278, 283). The court thereupon excluded from the coverage of the Act employees "working on parts where, until after manufacture, it is impossible to determine whether the parts are suitable for use under the contract" (R. 280). The court reviewed the manufacturing process in the Endicott Johnson plants, and concluded that, in the case of each of the eight factories and departments involved, it was impossible to tell which piece of leather, sole, counter, heel, or carton would be used to make up a boot or shoe furnished under

⁴ The court itself remarked: "I would expect the integrated industries would have a larger proportion of the contracts, the same as I would expect Ford, General Motors, and so on, would have the big percentage of the contracts for cars—they are the big industries" (R. 94).

Government contract until after the particular process carried on in the plants was completed and a selection made from the finished parts. Accordingly, the court characterized the process of manufacturing carried on in these plants as "manufacture for stock," which it held not to be covered by the Act. (R. 282.)*

A final order denying the Secretary's renewed motions for judgment on the pleadings and for summary judgment, and denying and dismissing her complaint and application was entered on October 27, 1941 (R. 283-284).

On appeal to the court below (R. 284-297)* the judgment of the District Court was reversed and the case remanded to the District Court with in-

* In addition, the opinion seems to hold that the manufacture of cartons and the tanning and rubber-making processes are generally unrelated to the "manufacture of shoes," and that therefore a stronger burden of proof rested on the Secretary to show that the materials processed in these factories were expressly manufactured for use in Government contracts rather than for "stock." Moreover, the court held, cartons are not "materials required" under contracts calling for the manufacture of shoes and boots, and not covered by the Act at all (R. 283-284).

* The appeal was taken according to both the simplified procedure established by the Federal Rules of Civil Procedure (R. 284) and the former procedure (R. 284-294) out of an abundance of caution. The court below held that it is sufficient to follow the simplified procedure of the Federal Rules, even though they "may not be fully applicable to the pre-appellate stages of this type of proceeding * * *" (R. 332).

structions to enforce the subpoenas (R. 333). In its unanimous opinion (R. 298-332) the court held that although it might have disposed of the case "on the ground that the testimony taken by the District Court amply proved the fact of coverage, as we are inclined to believe it did" (R. 301), it preferred not to rest its decision on that ground "since we hold that the District Court should have enforced the subpoenas, on the pleadings, without taking any testimony whatever" (R. 301-302).

SUMMARY OF ARGUMENT

1. The court below properly held that the district court erred in adjudicating the question whether the employees whose work records are sought are within the coverage of the Act. That question, as appears from the pleadings, is a substantial one and is for the determination of the Secretary in the administrative proceeding. The decision of the district court is in effect an interlocutory review not warranted by the statute and incompatible with sound principles of judicial administration. More than that, it serves to forestall administrative determination. In numerous analogous situations, where a court is called upon to lend its process in aid of another proceeding, the criterion employed is whether the material sought is plainly irrelevant to a lawful subject of inquiry in the principal proceeding.

Other defenses may, of course, be raised, as the circuit court of appeals recognized. But they have no bearing here. Among these are the defenses that the subpoena violates a privilege of the witness, or is unduly oppressive, or has not been issued by the officer solely empowered to do so, or has issued out of a proceeding of a kind which is not authorized to be held.

2. While we maintain that the issue of coverage is not to be decided in this case, the circuit court of appeals was right in its opinion that in any event the evidence plainly established the coverage of the employees involved. They are embraced within the statutory language as persons employed in the manufacture of articles, supplies, or materials to be used in the performance of a Government contract. This is so whether the articles manufactured be taken to include the component parts, such as soles, heels, and counters, or whether the articles manufactured are confined to the shoes which are the ultimate product. Regulations issued in 1939 specifically include the manufacturing processes in issue. A contrary interpretation would open the door to evasion of the Act. The decision of the district court rested on an erroneous view of departmental rulings concerning stock piles; it held that items are not covered by the Act until they have reached the point at which they are definitely selected for use under the Government

contract. In fact, materials in stock piles are excluded only where they have accumulated prior to the award of the Government contract. Here, again, a broader exemption would serve to defeat the purposes of the Act by permitting selection of goods to be made at the close of the manufacturing processes.

ARGUMENT

I

THE DISTRICT COURT SHOULD NOT HAVE DETERMINED IN THIS PROCEEDING WHETHER THE EMPLOYEES IN QUESTION ARE WITHIN THE COVERAGE OF THE PUBLIC CONTRACTS ACT

The petitioner corporation is admittedly subject to the Public Contracts Act in respect of the contracts here involved. The question whether employees in eight of its departments or plants are within the coverage of the Act is admittedly an issue which the Secretary of Labor was authorized to decide in the administrative hearing which was begun three years ago. That issue, it can hardly be denied, is a substantial one, turning as it does on the treatment to be given under the Act to employees of the contractor who are engaged in intermediate manufacturing processes in an integrated enterprise. It is our position that, when a district court is asked in the course of the administrative hearing to enforce a subpoena relating to the employment records of these employees, the court

should not determine for itself the ultimate issue of coverage as a condition of enforcing the subpoena. A number of important defenses to the subpoena may be raised; but this defense, requiring the court to prejudge the ultimate issue for the Secretary, is not one of them.

At the outset we disavow any contention that the function of the district court in enforcing a subpoena under Section 5 of the Act is "ministerial," or that the court is "bound to enter an order for the relief requested, regardless of any challenge thereof" (Pet. Br. 19). Such a contention is a misapprehension both of our position and of the opinion of the Circuit Court of Appeals (see R. 308-309, 328 and note 64). To an application for enforcement of a subpoena "appropriate defence may be made." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49. The application may properly be resisted on the ground that a privilege of the witness, like that against self-incrimination, would be violated. Cf. *Boyd v. United States*, 116 U. S. 616. Or it may be resisted on the ground that the subpoena is unduly vague or unreasonably burdensome, *Hale v. Henkel*, 201 U. S. 43; or that the hearing is not of the kind authorized, *Harriman v. Interstate Commerce Commission*, 211 U. S. 407; *Ellis v. Interstate Commerce Commission*, 237 U. S. 434; or that the subpoena was not issued by the person solely vested with that power, *Cudahy Packing Co. v. Holland*, 315 U. S. 357. To these may be

added the ground that on the pleadings it is plain that the evidence sought is not germane to any lawful subject of inquiry in the administrative proceedings, as, for example, a demand in these proceedings for a list of the petitioner's stockholders. Thus there is ample scope in the auxiliary judicial proceeding for protection against arbitrary use of the subpoena power. Thus, by the same token, there is no issue in the present case arising from Article Three or the Fourth Amendment of the Constitution.

The issue here lies in a narrower compass. Stated briefly, it is whether an application for enforcement of a subpoena for employment records of employees whose coverage under the Act is genuinely in issue in the administrative hearing shall be made the occasion for the courts to adjudicate that issue in what is essentially an interlocutory auxiliary proceeding. The decision below, holding such an adjudication to be improper, is in harmony with the statute and is compelled, we submit, by accepted principles of judicial administration.

The statute in section 5 confers power on the Secretary of Labor or his representative to hold hearings on complaint of a violation of the stipulations required by the Act. In the present case

It is noteworthy that the records sought are of the kind which petitioners have, since 1938, been exhibiting to agents of another division of the Department of Labor under the Fair Labor Standards Act. See R. 311, n. 23.

the stipulations exist, a complaint was duly filed, and the hearings were begun. Section 5 empowers the Secretary or his representative to "issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath."

In case of refusal of any person to obey such an order, an appropriate district court is given jurisdiction, on application of the Secretary or his representative, to issue an order requiring such person "to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; * * *."

It will be observed that a standard of relevance is laid down: relevance to "the matter under investigation or in question." Here the matter is the asserted violation of the wage and hour standards with respect to certain of petitioner's employees. The merits of the controversy obviously turn on two component questions: whether these employees are covered, and whether the standards were met. Both of these component issues are, on any view, within the authority and indeed the responsibility of the Secretary to decide; and evidence relating to either of them is evidence relating to a "matter under investigation or in question." So far as relevancy is concerned, it would be unwarranted to read into these provisions anything more than that pursuit of the matter in question be not patently insubstantial. This is a criterion which, as will

be shown, is applied in other auxiliary proceedings.*

The essential problem is one of "judicial administration", as it was put in the *Myers* case, *supra*. The interruption of administrative proceedings for a plenary trial in court of a pending administrative issue cannot be sanctioned without violence to sound relations between judicial and administrative tribunals. If petitioners had sought to enjoin the proceedings on the ground that they were outside the province of the Secretary, the attempt would have been given short shrift. This is so, as the *Myers* case shows, even though the attack were based on plausible grounds of want of constitutional power—grounds which the present case does not even approach. If petitioners had sought to prevent the introduction in evidence by the Government of the data now sought, until a determination of the authority of the Secretary, the effort would likewise have been repulsed. *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375. If the Government had sought to elicit the information by oral testimony, and the witness had refused to answer, it can scarcely be supposed that a court would have conditioned an order on a trial and decision of the issue of coverage. The circumstance that the information is in

* Compare also the criterion of a "substantial" federal question, for purposes of federal jurisdiction, original or appellate.

the possession of petitioner and is in documentary form does not justify a contrary result. The relations between tribunals are of too great moment to turn on whether the judicial proceeding is instituted by an objecting party or by the Government seeking statutory sanctions against a recusant party.

Our position is supported by repeated decisions concerning the function of an auxiliary court when it is asked to lend its aid pursuant to statute. Where judicial aid is sought to compel testimony or procure evidence in connection with a grand jury investigation, "witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." *Blair v. United States*, 250 U. S. 273, 282-283. All that need be shown to compel the testimony is "relevancy to the subject of investigation." *Ibid.*; *Essgee Company v. United States*, 262 U. S. 151, 157; *Brown v. United States*, 276 U. S. 134, 143; *Wilson v. United States*, 221 U. S. 361, 382.

In a situation quite similar to that at bar, where judicial aid is sought to compel testimony and pro-

cure evidence in aid of a hearing in another court, the auxiliary court does not determine for itself the relevance or competence of the evidence, but only whether it is patently inadmissible. The governing canon was stated by Judge Sanborn in *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 211, 215 (C. C. A. 8th):

It is not the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken in a suit pending in the court of another district, to consider or determine the competency, materiality, or relevancy of the evidence which one of the parties seeks to elicit. It is the duty of such a court or judge to compel the production of the evidence, although the judge deems it incompetent or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence cannot possibly be competent, material, or relevant and that it would be an abuse of the process of the court to compel its production.* * *

* See also *Tucker v. Peiler*, 297 Fed. 570, 574 (C. C. A. 2d), certiorari denied, 265 U. S. 587; *Robus & Co., Inc. v. American Founders Corp.*, 8 F. Supp. 97 (W. D. N. Y.); *Acme Card System Co. v. Remington Rand Business Service*, 9 F. Supp. 1001, 1002 (W. D. N. Y.); *Belding-Corticelli Limited v. Kaufman*, 10 F. Supp. 991, 992 (E. D. Pa.); *Perry v. Rubber Tire Wheel Co.*, 138 Fed. 836, 837 (S. D. N. Y.); *Butte & H. Consol. Min. Co. v. Montana Ore Purchasing Co.*, 139 Fed. 843 (S. D. N. Y.); *Matter of Randall*, 90 App. Div. 192, appeal dismissed, 177 N. Y. 450.

Likewise, under the practice of discovery in aid of an action at law, the auxiliary court confines its inquiry into relevance to the pleadings in the principal action." Particularly apposite is *Sinclair Refining Co. v. Jenkins Co.*, 289 U. S. 689. "The remedy of discovery," it was there decided, "is as appropriate for proof of a plaintiff's damages as it is for proof of other facts essential to his case" (p. 693). The equity court will not deny the remedy and force the principal action to be decided piecemeal, with an interlocutory judgment on the issue of liability *vel non*. The integrity of the principal action will be preserved, where it was not brought "without probable cause or as an instrument of malice" (p. 697.)"

¹⁰ E. g. *Lansing B. Warner, Inc. v. Lehigh Valley R. Co.*, 75 F. (2d) 483 (C. C. A. 2d); *Indianapolis Amusement Co. v. Metro-Goldwyn-Mayer D. Corp.*, 90 F. (2d) 782 (C. C. A. 7th).

¹¹ Under the Federal Rules of Civil Procedure, the allowance of examinations, depositions, admissions, and subpoenas before trial is governed by similar criteria. Rule 26 (b) provides that the deponent may be "examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party * * *." Rule 30 (d) provides that the court in which the action is pending or the court in the district where the deposition is being taken may terminate or limit the examination "upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party." Under Rule 45, subpoenas may be quashed if "unreasonable and oppressive." For representative deci-

The dilemma which the Court avoided in the *Sinclair* case can be avoided here and by the same rule: that bad faith or palpable irrelevance will defeat the application. The dilemma thus avoided is the false choice between original control over the issue undecided in the principal hearing, and review of an interlocutory ruling after controlling the internal procedure in that hearing. In the present case the statute clearly does not contemplate an interlocutory judgment by the Secretary. It contemplates a single hearing, with process available for the securing of evidence appropriate to the decision of all matters fairly in issue. To require an interlocutory administrative decision on the issue of coverage of employees would, in fact, under the practice prevailing require an interlocutory administrative appeal from the trial examiner to the Administrator and then to the Secretary.¹² There could, of course, be no appeal at this point to the court; the interlocutory decision could be

sions under these Rules; see: *Fox v. House*, 29 F. Supp. 673 (D. Okla.); *Berke v. United Paperboard Co.*, 26 F. Supp. 412 (S. D. N. Y.); *Lewis v. United Air Lines Transport Corp.*, 27 F. Supp. 946 (D. Conn.); *Sulzbacher v. Travelers Ins. Co.*, 6 Fed. Rules Serv. 36a.41 (W. D. Mo.). Where the pending suit is a bill in equity for patent infringement, the production of evidence regarding damages will ordinarily not be compelled before trial, since an interlocutory decree will be rendered. *Boysell Co. v. Colonial Coverlet Co.*, 29 F. Supp. 122 (E. D. Tenn.). This was explained in *Sinclair Refining Co. v. Jenkins Co.*, *supra*, 289 U. S. at 694.

¹² See Attorney General's Committee on Administrative Procedure, Monograph No. 1, pp. 15-22.

reviewed only collaterally if occasion arose in a subsequent subpoena proceeding arising out of the renewal of the hearings. Thus interlocutory judicial review would be superimposed on interlocutory administrative review. Such a disjointed procedure is surely not to be read into the statute in the name of sound judicial administration. Cf. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134.

The statute contemplates judicial review of final decisions of the Secretary. Such review can be had if action is taken against, or sums withheld from, the contractor under Section 2.¹³ Section 5 provides that findings of fact by the Secretary shall be conclusive in any court if supported by the preponderance of the evidence. In determining the scope of inquiry on an application to enforce a subpoena, those considerations are pertinent which have led this Court to define as narrowly as possible the concept of an appealable final judgment. *Cobbledick v. United States*, 309 U. S. 323. As the

¹³ The Secretary also has discretionary power to place a violator on an ineligible list for three years. Section 3. The District Court for the District of Columbia has held that such action is not judicially reviewable; on the authority of *Perkins v. Lukens Steel Co.*, 310 U. S. 113. *Lane Cotton Mills v. Perkins*, No. 8433, decided October 15, 1940. The question is irrelevant here. If a contractor has no legally protected interest in future contracts, and so no standing to complain of final blacklisting, that fact plainly does not strengthen his claim to interlocutory review. Cf. *Blair v. United States*, 250 U. S. 273.

three-year history of the present case demonstrates, an opportunity for full collateral determination of an issue at an interlocutory stage is an opportunity for frustrating the process of administration. Moreover, the present case is not merely one of judicial review, but of judicial control, since the Secretary had not made a decision on the issue decided by the district court. Had the Secretary attempted to revise the administrative procedure to provide for interlocutory administrative decision, the course of the proceedings might have been even more protracted.

The issue decided by the district court is of a character making judicial preemption especially inappropriate. It is an issue calling for a judgment informed by familiarity with industrial processes and with the practical workings of the Act. The issue should be decided in harmony with general regulations issued by the Secretary and consistently with determinations in analogous cases decided through the administrative process under the Act. There may also be subsidiary issues of fact on which decision turns; under the view of the district court, it becomes important to find the point in the processing of materials at which they are specifically selected for use in performing a Government contract." Apart from this feature,

" For example, petitioner Swartwood's affidavit, in opposition to the motion for summary judgment, states that "the hides which are to be used in upper leather in Government

issues of "coverage" have produced some of the most familiar examples of judicial deference to administrative judgment. *Rochester Telephone Corp. v. United States*, 307 U. S. 125; *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251; *Voehl v. Indemnity Ins. Co.*, 288 U. S. 162; *Gray v. Powell*, 314 U. S. 402. Here the district court did not simply substitute its judgment on such an issue for the Secretary's; the court felt constrained to forestall the Secretary's judgment.

The decision of the circuit court of appeals is in accord with others under comparable statutes. *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7th), certiorari denied 311 U. S. 690; *Cudahy Packing Co. v. Fleming*, 119 F. (2d) 209 (C. C. A. 5th), reversed on other grounds, *sub. nom. Cudahy Packing Co. v. Holland*, 315 U. S. 357; *National Labor Relations Board v. Barrett Co.*, 120 F. (2d) 583 (C. C. A. 7th); *Cudahy Packing Co. v. Fleming*, 122 F. (2d) 1005 (C. C. A.

shoes are not selected until approximately two-thirds of the tanning process has been completed, i. e., they have progressed to the stage of the fat liquor" (R. 49). Petitioners' witness Knickerbocker testified that the single sorting of sole leather for Government use was done in the sole-cutting plants (R. 161). Nevertheless the district court excluded the entire tanning and sole-cutting departments. Furthermore, opinions may differ as to the point when the operative "selection" is made. For instance, petitioners' witness Clark testified that three sortings were made in the Upper Leather Tannery (R. 148-151). The district court chose the last selection.

8th), reversed on other grounds, *sub nom.*, *Cudahy Packing Co. v. Holland*, 315 U. S. 785; *President v. Skeen*, 118 F. (2d) 58 (C. C. A. 5th); *Graham v. Federal Tender Board No. 1*, 118 F. (2d) 8 (C. C. A. 5th); *United States v. Clyde S. S. Co.*, 36 F. (2d) 691 (C. C. A. 2d), certiorari denied, 281 U. S. 244; *National Labor Relations Board v. New England Transportation Co.*, 14 F. Supp. 497 (D. Conn.); *Fleming v. G & C Novelty Shoppe, Inc.*, 35 F. Supp. 829 (N. D. Ill.); *Fleming v. Davidson Lumber Co.*, 3 Wage Hour Rept. 526 (E. D. Mich. 1940); *National Mediation Board v. Virginian Ry. Co.*, Pike & Fischer, Admin. Law, 44g, 31-4 (E. D. Va., June 6, 1941); *Federal Power Commission v. Peoples Natural Gas Co.*, decided September 17, 1941 (D. D. C.).

The decision in *General Tobacco & Grocery Company v. Fleming*, 125 F. (2d) 596 (C. C. A. 6th), appears to be inconsistent, and for that reason the Government did not oppose certiorari in the present case. We submit that the decision is erroneous in directing an adjudication of coverage. It should be pointed out, however, that the court in the case cited emphasized that there was no showing by the Administrator that the company was engaged in interstate commerce and so came under the Fair Labor Standards Act. The court distinguished a number of decisions where it appeared that the company was to some extent subject to the statute in question. The present case is, of course,

of the latter sort. Nor is it clear in the *General Tobacco* case how much of a showing of coverage would have been deemed sufficient. The record as described by the court in that case disclosed only allegations on information and belief without particulars upon which to base an inference that the company was engaged in interstate commerce. In the present case it is not open to dispute that a substantial issue regarding coverage was made by the pleadings in the district court.

II

ON THE UNDISPUTED FACTS APPEARING FROM THE PLEADINGS, AND CONFIRMED BY THE EVIDENCE, THE PERSONS EMPLOYED BY PETITIONER IN THE FACTORIES AND DEPARTMENTS IN CONTROVERSY ARE WITHIN THE COVERAGE OF THE ACT

We have urged that the district court was not the proper forum in which the issue of coverage should be adjudicated. If, however, this Court should wish to consider that issue, we maintain that on the undisputed facts appearing from the pleadings, and confirmed by the evidence, the employees of petitioner in the eight plants or departments in question are within the coverage of the Act, and accordingly the judgment below may be affirmed on this ground.

It is admitted that all or most of the leather, soles, rubber heels, cartons and counters used in the shoes and boots supplied to the Government

were processed in the eight plants (R 14-15, 236-237). Thus there is no dispute about the fact that at least some of the employees in the eight plants worked on materials which entered into the shoes furnished to the Government. It is also admitted that the Government may obtain records relating to all the employees in a plant if any of them may be found to be covered.

We maintain that the employees come within Sections 1 (b) and (c) of the Act as persons "employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract." In the first place, the manufacture of the leather, soles, heels, counters and cartons is the manufacture of "materials * * * used in the performance of the contract." These various components of the finished product were all covered by elaborate specifications in the contracts, which are merely outlined in the printed record for the sake of brevity (cf. R. 172). In the second place, if the finished shoes be regarded as alone constituting the materials, supplies, articles, or equipment manufactured under the contract, the employees were engaged in the manufacture of the shoes. A contrary view might permit a contractor substantially to avoid the application of the Act by confining the final process in manufacture to a relatively insignificant one, although the immediate processes were performed by employees in

other "departments." Such a result would tend to defeat the purposes of the Public Contracts Act as they were recognized by this Court in *Perkins v. Lukens Steel Corp.*, 310 U. S. 113, 127.

Our construction is confirmed by Section 1 (e) as explained in the original regulations issued by the Secretary in 1937. Section 1 (e) contains the same definition of materials, supplies, articles or equipment as is contained in Sections 1 (b) and (c). Section 1 (e), however, which requires that the manufacture be carried on under working conditions which are not insanitary or hazardous, is not limited to employees of the contractor itself. Consequently, Section 1 (e) requires its standards to be observed even where part of the manufacturing process is carried on by subcontractors. The regulations explained that while for most purposes work performed by a subcontractor who sells supplies and materials to the contractor with the Government is not covered, "The one exception to this rule is * * * under section 1 (e)." (R. 179-180.) Thus, if the soles, heels, etc., had been manufactured by another company, their manufacture would nevertheless have been within Section 1 (e). The fact that they were manufactured by the principal contractor himself services to bring them under the provisions of Sections 1 (b) and (c).

The district court's decision turns upon a point not stressed by petitioner. The court apparently

held that until the selection of a material, part, or piece for use in the performance of a Government contract is definitely made, the Public Contracts Act does not cover the process of manufacture. "The Act does not cover employees working on parts where, until after manufacture, it is impossible to determine whether the parts are suitable for use under the contract. Such employees are manufacturing for general stock as distinguished from working on contracts" (R. 280). This test does not depend upon the existence of separate factories or departments making materials to be used in assembling the final product (R. 280), or upon the practices or usage of a particular industry.¹⁵

This construction of the statute is, we submit, a plain misapplication of the "stock pile" ruling, adhered to from the beginning by the Act's administrators, that the Act does not apply to work on materials making up stock piles on hand at the time the Government contracts were entered into. The rationale of the ruling is that the Act should not apply retroactively to work done before the contractor was under any obligation to maintain the statutory standards. (See Rulings and Interpretations No. 2, Pl. Ex. 3-B, R. 184; Pl. Exs.

¹⁵ With respect to practices or usages, it is to be noted that the greater part of the boots and shoes contracted for by the Government have been produced in integrated establishments like petitioner's (R. 93-94, 206-207).

4-A and 4-B for Ident., R. 186-187, 190.) The rule has never been applied to work performed on materials after the award of the contract, except as to work on materials to replenish a stock pile existing at the time of the award and then sufficient for the performance of the Government contracts.¹⁶

Petitioners have never contended, or made any showing, that stock sufficient for fulfillment of the contracts was on hand at the time of the award of the contracts.¹⁷ The district court's extension of the exemption to materials wholly

¹⁶ In his letter of February 23, 1939, to petitioner corporation (Pl. Ex. 6, R. 204), the Administrator of the Division of Public Contracts wrote:

"There is an exception to the applicability of the Act and regulations to the processing of leather and rubber, to the extent that the leather and rubber already on hand and in stock at the time the contract is awarded may be used in the production of the shoes required under the contract without any obligation on the part of the contractor to show that such leather and rubber was processed in conformity with the labor standards prescribed by the Act and regulations. Needless to say, the use of items from stock on hand at the time of the contract award must be definitely established by available records."

¹⁷ Inspectors Stevenson and Hogue reported to the Chief of the Investigations Section of the Division of Public Contracts that Mr. Charles Johnson, an officer of the Endicott Johnson Corporation, had stated in conference with them that the company had no records to show that the leather used in the manufacture of the soles and heels, or its rubber heels and soles, were lifted from stock, but that in all probability a large portion of this leather was processed as needed, and

processed after the contracts were made is thus entirely unsupported by the administrative practice, or by the reasons for the departmental rule. The district court's construction might render the Public Contracts Act inapplicable to most of the manufacturing process of any concern simultaneously fabricating articles for the Government and for private purchasers. There is often no clear separation of work on Government contracts and private work until the final stages of manufacture, and under the theory of the district court, it could well be claimed that no process prior to the final sorting and selection of the end product is covered by the Act."

Several contentions made by petitioners remain to be noted. It is argued that administrative practice precludes the Secretary from ruling that the employees in question are covered. It is perfectly plain that under the formal rulings

"possibly" the rubber heels and shoes were also manufactured as needed, and that the upper leather could not have been lifted from stock (Pl. Ex. 15 for Ident., R. 262, 126).

"The Division of Public Contracts has ruled that "If no separate records for employees engaged on Government work are maintained, all employees in the plant are presumed, until affirmative proof is presented to the contrary, to be engaged on Government work" (R. 181). This ruling is contrary in tendency to the district court's construction. Nevertheless, it might not remedy the harm caused by that interpretation of the Act. Under the district court's view, proof as to the time when final selection is made might presumably constitute "affirmative proof * * * to the contrary."

issued by the Secretary in 1939 the employees are covered. Those rulings discuss specifically the problem of the integrated establishment, and provide that the Act is applicable to those departments engaged in the manufacture or production of the materials or supplies to be incorporated into or used in the manufacture of the ultimate product to be delivered to the Government. (R. 183, 184.) Among the examples given are the processing of leather and rubber for shoes, the production of sand and gravel for use in making concrete, and the manufacture of pulp for paper to be used in performance of a Government contract (R. 184). The earlier rulings of 1937 contained no provision on the subject. Petitioners rely, however, on two letters offered in evidence by the Government as showing an earlier and different interpretation. Those letters were addressed to the International Harvester Company and the Baldwin Locomotive Works, respectively (R. 198, 189), and were signed by the Acting Administrator of the Public Contracts Act. Petitioners frankly acknowledge that the last-mentioned letter had not come to their attention (Pet. Br. 40). The letters must be read in their context as replies to inquiries by the two companies setting forth the facts. The letter from the International Harvester Company indicates that the materials in question were parts "accumulated in stock piles" (R. 200), and the

reply may therefore be taken as resting on that circumstance. If the reply, together with the reply to the Baldwin Locomotive Works, goes further, it cannot be regarded as evidencing either a sound or settled administrative practice binding on the Secretary. The Government in the district court offered to prove the administrative practice by adducing not only written interpretations but an account of oral rulings as well; this offer was rejected by the court on the ground that it was proper matter for a brief, and in fact the district court stated that it took cognizance of such practice as described in the Government's brief (R. 279, 280). Some of the relevant interpretations are summarized in the margin.¹⁹

Petitioners also rely on definitions of the shoe industry or of the shoe and allied industries as framed by the Census Bureau and the Wage and

¹⁹ Examples of the administrative practice are: (1) In the case of *steel companies*, it has been held that under a contract calling for finished steel products, operations in the galvanizing plants were subject to the Act, although many if not most steel mills sublet their galvanizing; (2) Under Government contracts for the supply of *radio equipment*, it was held that all the operations of the contractor, including their tube manufacturing plants, were subject to the Act, even though most radio manufacturers do not make their own tubes; (3) In the case of Government contracts for articles of *wearing apparel*, it has repeatedly been held that all operations of the textile manufacturer under Government contracts are subject to the Act, even though not all textile mills are fully integrated; (4) In the case of Government contracts

Hour Division under the Fair Labor Standards Act. These definitions, it is to be observed, would apparently include many of the processes here in question, particularly the manufacture of soles and counters. (R. 268, 270.) More important, these definitions of "industries" are beside the point under the Public Contracts Act. The designation of an industry is made under the Act only for the purpose of determining a prevailing minimum wage; in the present case the only such determination was made for the welt-shoe industry, and although five of the contracts were awarded thereafter, only three of the contracts are claimed by the Government to be affected (R. 209-210, 247, 267). A manufacturer may be subject to the Act with respect to many processes which are not included within a single "industry" as determined for that purpose. That is, a manufacturer may be embraced within several industries if his operations are sufficiently extensive.

for *handkerchiefs*, it was held that a bleachery operating as a part of an integrated establishment of the contractor was subject to the Act, even though it was the general practice of the industry to sublet the bleaching of the greiged goods or to dye the cloth in a finished state; (5) In the case of a Government contract for *prefabricated buildings*, it was held that a planing mill operating as an integral part of a plant was subject to the Act; (6) In the case of a Government contract for *triple superphosphate*, it was held that the production of the component chemicals in separate plants of the contractor, for use in making the final triple superphosphate in a third plant, was subject to the Act.

In any event, of course, definitions of an industry under other statutes would not be binding under the Public Contracts Act.

In short, while we maintain that the issue of coverage is not properly presented in this case and on this record, but is to be decided in the administrative proceeding on a record there made, we believe that the circuit court of appeals was right in the opinion it expressed that the testimony in the district court amply proved the fact of coverage (R. 301).

CONCLUSION

For the foregoing reasons the judgment of the circuit court of appeals should be affirmed.

Respectfully submitted.

✓ CHARLES FAHY,
Solicitor General.

✓ FRANCIS M. SHEA,
Assistant Attorney General.

✓ PAUL FREUND,
✓ SIDNEY J. KAPLAN,
Special Assistants to the Attorney General.

DAVID L. KREEGER,
ELLIS LYONS,
Attorneys.

IRVING J. LEVY,
Acting Solicitor,
Department of Labor.

NOVEMBER 1942.

APPENDIX

Walsh-Healey Public Contracts Act, 49 Stat. 2036
(41 U. S. C. 35-45)

AN ACT

To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without sub-

sequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of \$10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments

shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his author-

ized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evi-

dence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the appli-

cation of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for

other purposes", approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock, and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Approved, June 30, 1936.

SUPREME COURT OF THE UNITED STATES.

No. 142.—OCTOBER TERM, 1942.

Endicott Johnson Corporation and
Howard A. Swartwood, Secretary,
Endicott Johnson Corporation, Pe-
titioners,

vs.

Frances Perkins, Secretary of Labor
of the United States.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Second Circuit.

[January 11, 1943.]

Mr. Justice JACKSON delivered the opinion of the Court.

This case concerns the validity of a subpoena issued by the Secretary of Labor in administrative proceedings against the petitioner under the Walsh-Healey Public Contracts Act.¹ The petitioner successfully resisted the Secretary's petition for enforcement in the District Court,² whose judgment was in turn reversed by the Circuit Court of Appeals for the Second Circuit.³ We granted certiorari because of the importance of the questions in the enforcement of the Act, and because of probable conflict with a holding of the Circuit Court of Appeals for the Sixth Circuit.⁴

The Walsh-Healey Act requires that contracts with the Government for the "manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000" shall represent and stipulate, *inter alia*, for the payment of "not less than the minimum wages as determined by the Secretary of Labor" (§1(b)), and that "no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess

¹ 49 Stat. 2036; 41 U. S. C. § 35-45.

The proceedings were instituted against both petitioners, the Endicott Johnson Corporation and its secretary, and both participated in the subsequent litigation. For convenience we refer to both as "the petitioner."

² 37 Fed. Supp. 604 and 40 Fed. Supp. 254.

³ 128 F. 2d 208.

⁴ — U. S. —; General Tobacco & Grocery Co. v. Fleming, 125 F. 2d 596.

of forty hours in any one week" (§ 1(c)); but provides that the Secretary may allow exemptions from the minimum wage provisions, and permit increases in the stipulated maximum hours on payment of wages at "not less than one and one-half times the basic hourly rate received by any employee affected." (§ 6.)

The Act provides for liquidated damages for violations of required stipulations in the contract (§ 2); and, further, that "unless the Secretary of Labor otherwise recommends" no government contract shall be awarded to the firm or subsidiaries of the firm which he finds to have defaulted in its obligation under the Act "until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred." (§ 3.)

The Secretary is directed "to administer the provisions of this Act" and empowered to "make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions." (§ 4.) And that he may the better and the more fairly discharge his functions, he is authorized to hold hearings "on complaint of a breach or violation of any representation or stipulation" and "to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. . . . In case of contumacy, failure, or refusal of any person to obey such an order," the District Court of the United States "shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." The Secretary is directed to make "findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor . . . shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act." (§ 5.)

Pursuant to her authority under the Act, the Secretary in 1937 defined by rulings the coverage of the Act. She provided, *inter alia*, that "employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the perform-

ance of the contract" might be employed overtime, at "one and one-half times the basic hourly rate or piece rate received by the employee."⁵ Stipulations as to minimum wages were made to "apply only to purchases or contracts relating to such industries as have been the subject of a determination by the Secretary of Labor."⁶ Thereafter, and on December 21, 1937, she made a determination of minimum wages to be paid employees "engaged in the performance of contracts . . . for the manufacture or supply of men's welt shoes." On September 29, 1939, and after the completion of the contracts involved in this case, the Secretary issued Rulings specifically dealing with "integrated establishments."⁷

From the pleadings in the District Court and admitted statements in affidavits filed, there appear the following facts:

Between October 26, 1936, and June 8, 1938, petitioner was awarded several contracts for boots, shoes, gymnasium shoes and arctic overshoes. Each was for an amount in excess of \$10,000, and each contract included representations and stipulations in accordance with the Act and the Secretary's rulings thereunder set out above. Bids for and awards of the contracts designated the places of manufacture, and manufacture elsewhere was forbidden.⁸

⁵ Rulings and Interpretations under the Walsh-Healey Public Contracts Act, No. 1, § 4(2) (a).

⁶ *Ibid.* § 4(1).

⁷ Rulings and Interpretations No. 2, providing in § 1(2):

"When a contractor to whom a contract subject to the Act is awarded operates an integrated establishment which manufactures or produces materials or supplies that are incorporated into or otherwise used in the manufacture or supply of the materials, supplies, articles, or equipment called for by the contract, the Act is applicable to those departments which are engaged in the manufacture or production of the materials or supplies to be so incorporated into or used in the manufacture or processing of the ultimate product to be delivered to the Government as well as to the employees engaged in the manufacture or processing of that ultimate product. For example: The processing of the leather and rubber for the shoes supplied under Government contracts subject to the Act is within the purview of the Act and Regulations, and compliance therewith is essential."

⁸ The bid stated:

"Bidders must state in space provided below names and locations of the factories where manufacture of the item bid upon will be performed. The performing of any of the work contracted for in any place other than that named in the bid is prohibited unless the same is specifically approved in advance by the Contracting Officer. If more than one place of manufacture is named, the quantity to be manufactured in each place must be given."

A typical statement in response is:

Names and locations of factories:

Quantities

"George F. Tabernacle" Factory (item 1) 133,524 pairs

In the plants so specified notices required by the contract were posted,⁹ and there the petitioner admitted an obligation and apparently intended to comply with the Act and contract. The violations claimed in those plants are minor, if any; petitioner offered to adjust any violation found there and it has willingly furnished complete records and information as to those plants and those employed in them. But there ended, the petitioner claims, both the investigatory power of the Secretary and its obligation to make its records available.

The Secretary did not agree, and instituted an administrative proceeding against petitioner charging violation of the stipulations in the contract by virtue of payments by petitioner of less than the minimum wages determined by her on December 21, 1937, for the "manufacture or supply of men's welt shoes", and of failure to make required additional payments for overtime work, in other and physically separate plants owned and operated by the petitioner. In those plants it manufactured parts such as counters and rubber heels, tanned leather for uppers and soles, and made cartons for packaging shoes for the Government, as well as for its civilian customers. The subpoena in question issued in this proceeding called for records chiefly relating to payrolls in such plants, and as to them the petitioner refused to comply.

To obtain the compliance to the subpoena which petitioner refused, the Secretary had resort to the District Court as provided by § 5, alleging the foregoing facts and that "following an investigation by representatives of the Department of Labor, and it having appeared to the plaintiff upon the basis of such investigation that defendant" had violated these stipulations of the contracts, she commenced such proceeding; and that "plaintiff has reason to believe, and said amended (administrative) complaint alleges, that the persons employed" and alleged to have been under-

East side of Washington Street (item 2).....	182,256 pairs
(South of corner Susquehanna Street), Binghamton,	
N. Y., (total items 1 and 2).....	315,780 pairs

A typical notice of award stated:

For 133,524 pairs Shoes, Service; Special Type "B," with Full Middle sole and Rubber Heel; 182,256 pairs Shoes, Service, Special Type "B," with Corded Rubber Sole and Uncorded Rubber Heel.

To be manufactured at or supplied from Geo. F. Tabernacle, Binghamton, N. Y.
(Name and location of plants)

⁹ Article 18(g).

paid "in its Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery, Paracord Factory, Sole Cutting Department (Johnson City), Sole Cutting Department (Endicott), Counter Department (Johnson City), and Carton Department (Johnson City) were employed by it in performance of the contracts specified," and that such allegations were denied by the answer in the administrative proceedings.

The Corporation pleaded to the District Court its ownership and management of the plants in question and that the rubber heels and soles, the counters, cartons, and all except a portion of the leather soles "used in the manufacture" of the government footwear "were manufactured" in its several separate plants or departments. It also set forth in full its answer in the administrative proceeding and reasons why it considered "arbitrary, artificial, unreasonable, discriminatory, and capricious" the ruling of the Secretary that the Act and contract applied to the plants other than those specifically named in the contracts. It denied that the payroll and similar records sought as to such plants were relevant to the determination of any matter confided to the Secretary's determination.

The District Court denied the Secretary's motion on the pleadings and accompanying affidavits for an enforcement order, overruled her contention that it was for her to decide this issue in the administrative proceeding, and set the case down for trial on the question of whether the Act and contracts under the circumstances covered the separate plants.

We think that the admitted facts left no doubt that under the statute determination of that issue was primarily the duty of the Secretary.

The Act directs the Secretary to administer its provisions. It is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract. Its purpose is to use the leverage of the Government's immense purchasing power to raise labor standards.

Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts.¹⁰ One of her principal functions is the conclusive determination of

¹⁰ Cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, and cases there cited.

questions of fact for the guidance of procurement officers in withholding awards of government contracts to those she finds to be violators for three years from the date of the breach.

The matter which the Secretary was investigating and was authorized to investigate was an alleged violation of this Act and these contracts. Her scope would include determining what employees these contracts and the Act covered. It would also include whether the payments to them were lower than the scale fixed pursuant to the Act. She could not perform her full statutory duty until she examined underpayments wherever the coverage extended, because underpayment is an indispensable, albeit not the only, element of proof of violation. It is the only basis on which she can compute liquidated damage as she is required to do, and it is necessary to find the date of the last underpayment to fix the beginning of the three-year period of disqualification for further contracts. Thus the payrolls are clearly related to the violation. Indeed, the underpayment is itself the violation under investigation.

Of course another indispensable element of violation is that the underpaid employee be included within the benefits of the Act and contracts. This, too, was a matter under investigation in the administrative proceeding. But because she sought evidence of underpayment before she made a decision on the question of coverage and alleged that she "had reason to believe" the employees in question were covered, the District Court refused to order its production, tried the issue of coverage itself, and decided it against the Secretary. This ruling would require the Secretary in order to get evidence of violation either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision. The former would be of dubious propriety, and the latter of doubtful practicality. The Secretary is given no power to investigate mere coverage, as such, or to make findings thereon except as incident to trial of the issue of violation. No doubt she would have discretion to take up the issues of coverage for separate and earlier trial if she saw fit. Or, in a case such as the one revealed by the pleadings in this one, she might find it advisable to begin by examining the payroll, for if there were no underpayments found, the issue of coverage would be academic. On the admitted facts of the case the District Court had no authority to control her procedure or to condition enforcement of her subpoenas upon her first reaching

and announcing a decision on some of the issues in her administrative proceeding.

Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration. The Secretary may take the same view of the evidence that the District Court did, or she may not. The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do, and that decision was stated by the Act to be conclusive as to matters of fact for purposes of the award of government contracts. Congress sought to have the procurement officers advised by the experience and discretion of the Secretary rather than of the District Court. To perform her function she must draw inferences and make findings from the same conflicting materials that the District Court considered in anticipating and foreclosing her conclusions.

The petitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, but they are not of a kind that can be accepted as a defense against the subpoena.¹¹

The subpoena power delegated by the statute as here exercised is so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions urged by the petitioner, and on the record before us the cases on which it relies¹² are inapplicable and do not require consideration.

Affirmed.

¹¹ These relate to: the meaning of the contract and the Act as implemented by administrative rulings in existence at the time of the making and performance of the contract; the question of possible retroactive effect of Rulings and Regulations No. 2, *supra*, note 7; the nature of petitioner's business organization; and practices of procurement, manufacture, storage, consumption and distribution obtaining at petitioner's plants.

¹² *Boyd v. United States*, 116 U. S. 616; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Harriman v. Interstate Commerce Commission*, 211 U. S. 407; *Ellis v. Interstate Commerce Commission*, 237 U. S. 434; *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298.

SUPREME COURT OF THE UNITED STATES.

No. 142.—OCTOBER TERM, 1942.

Endicott Johnson Corporation and
Howard A. Swartwood, Secretary,
Endicott Johnson Corporation, Pe-
titioners,

vs.

Frances Perkins, Secretary of Labor
of the United States.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Second Circuit.

[January 11, 1943.]

Mr. Justice MURPHY, dissenting.

Because of the varied and important responsibilities of a quasi-judicial nature that have been entrusted to administrative agencies in the regulation of our political and economic life, their activities should not be subjected to unwarranted and ill-advised intrusions by the judicial branch of the government. Yet, if they are freed of all restraint upon inquisitorial activities and are allowed uncontrolled discretion in the exercise of the sovereign power of government to invade private affairs through the use of the subpoena, to the extent required or sought in situations like the one before us and other inquiries of much broader scope, under the direction of well meaning but overzealous officials they may at times become instruments of intolerable oppression and injustice. This is not to say that the power to enforce their subpoenas should never be entrusted to administrative agencies, but thus far Congress, for unstated reasons, has not seen fit to confer such authority upon any agency which it has created.¹ So here, while the Secretary of Labor is empowered to administer the Walsh-Healey Act, to "prosecute any

¹ The disregard of subpoenas issued by some agencies is punishable by fine and imprisonment in a criminal proceeding, but apparently no federal agency has ever been given the power to punish disobedience as a contempt of its authority. (See Final Report of the Attorney General's Committee on Administrative Procedure, Appendix K.) The common method of enforcing subpoenas is to punish disregard of the subpoena as contempt of the issuing body. It has been held in some states that the power to punish for contempt cannot be conferred upon a body of a non-judicial character. See *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190; *In re Whitcomb*, 120 Mass. 118, 21 Am. Rep. 502. Contra, *In re Hayes*, 200 N. C. 133, 156 S. E. 791. Compare statements in *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447, at 485 and 489.

inquiry necessary to his functions", and "to issue orders requiring the attendance and the testimony of witnesses and the production of evidence under oath", he alone cannot compel obedience of those orders. "Jurisdiction" so to do is conferred upon the district courts of the United States and it is our immediate task to delineate the proper function of those courts in the exercise of this jurisdiction.² Specifically the question is: What is the duty of the courts when the witness or party claims the proceeding is without authority of law?

This Court, in recognition of the drastic nature of the subpoena power and the possibilities of severe mischief inherent in its use, has insisted that it be kept within well-defined channels. Cf. *Boyd v. United States*, 116 U. S. 616; *Hale v. Henkel*, 201 U. S. 43; *Fed. Trade Comm. v. Amer. Tobacco Co.*, 264 U. S. 298; *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 363. In conditioning enforcement of the Secretary's administrative subpoenas upon application therefor to a district court, Congress evidently intended to keep the instant subpoena power within limits, and clearly must have meant for the courts to perform more than a routine ministerial function in passing upon such applications. If this were not the case, it would have been much simpler to lodge the power of enforcement directly with the Secretary, or else to make disregard of his subpoenas a misdemeanor. So we have said that "appropriate defense may be made" to such an application for enforcement. *Myers v. Bethlehem Corp.*, 303 U. S. 41, 49.

The Government concedes that the district courts are more than mere rubber stamps of the agencies in enforcing administrative subpoenas and lists as examples of appropriate defenses, claim: that a privilege of the witness, like that against self incrimination, would be violated;³ or that the subpoena is unduly

² Section 5 of the Act provides in part: "In case of contumacy, failure, or refusal to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; . . ."

Criminal sanctions are not provided.

³ Cf. *Boyd v. United States*, 116 U. S. 616.

vague or unreasonably oppressive;⁴ or that the hearing is not of the kind authorized;⁵ or that the subpoena was not issued by the person vested with the power;⁶ or that it is plain on the pleadings that the evidence sought is not germane to any lawful subject of inquiry. But the Government insists that the issue of "coverage", i. e., whether the Act extends to plants of petitioner's establishment which manufactured materials used in making complete shoes but not named in the contracts, is not a proper ground for attack in this case. I think it is.

If petitioner is not subject to the Act as to the plants in question, the Secretary has no right to start proceedings or to require the production of records with regard to those plants. In other words, there would be no lawful subject of inquiry, and under present statutes giving the courts jurisdiction to enforce administrative subpoenas, petitioner is entitled to a judicial determination of this issue before its privacy is invaded. Cf. *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447, 479; *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407; *Ellis v. Int. Com. Comm.*, 237 U. S. 434; *General Tobacco & Grocery Co. v. Fleming*, 125 F. 2d 596.

Of course, the courts should not arrogate to themselves the functions of administrative agencies. It is trite but truthful to say that administrative agencies render valuable and very necessary services in the solution of the complex governmental and economic problems of our time. In the making of investigations, the determination of policy, the collection of evidence, and its current evaluation, preparatory or incidental to administrative action, experience and special training are valuable aids. But after all, as pointed out by Gellhorn, *Federal Administrative Agencies*, pp. 27-29, the administrator is only an expert *ex-officio*.⁷ Just as the courts should not usurp the prerogatives of

⁴ Cf. *Hale v. Henkel*, 201 U. S. 43; *Fed. Trade Comm. v. Amer. Tobacco Co.*, 264 U. S. 298.

⁵ Cf. *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407; *Ellis v. Int. Com. Comm.*, 237 U. S. 434.

⁶ Cf. *Cudahy Packing Co. v. Holland*, 315 U. S. 357.

⁷ "When reference is made to the 'expert administrative agency', it is surely not intended to mean that the expertness is lodged in the head or heads of the agency, or that they in their own person possess every expertise needed for the informed discharge of the manifold duties imposed upon the modern administrative organization. The administrative agency as now organized is a vehicle for bringing the judgments of numerous specially qualified officials to bear upon a single problem. . . . We must look beyond the heads to find the talents which make the agency expert in its assigned tasks. This is a central reality."

the agencies, neither should the word "administrative" and its companion "expertness" overawe them into abdicating responsibilities imposed upon them by Congress.

The legal propriety of instituting proceedings is a question which an agency is authorized if not obliged to determine, provisionally at least, before instituting the proceedings. But while the decision may be the agency's in the first place, it is not a decision which it is ordinarily more competent to make than the courts and judges, who (at least in theory) should be more qualified than administrative officers, many of whom are laymen, to determine whether a statute extends to a certain set of facts. If the preliminary determinations by an agency of the scope of its power and jurisdiction are sacrosanct, why did Congress subject their final determination to judicial scrutiny, as it has done in the Walsh-Healey Act with regard, at least, to the enforcement of the wage and hour requirements on behalf of the employees? And if the courts are qualified to pass final judgment on the "quasi-judicial" findings and conclusions of the administrators, which they are ordinarily permitted to do to a greater or lesser extent,⁸ they are no less qualified to determine whether the evidence which moved the administrator to enter a formal complaint is sufficient in law to show probable cause that the statute under which the administrator is proceeding covers the case. Without such a showing of probable cause, the district courts ought not to be required as a matter of mere routine to lend their aid to the proceeding by compelling obedience to the subpoena.

It is to be understood, of course, that if the matter is in doubt and if there is a reasonable legal basis for the charge, the court should not substitute its judgment on the law or the facts for that of the agency. The court's duty is to assist the agency in the performance of its functions and the discharge of its responsibilities, in the absence of a clear and convincing showing that it is proceeding without legal warrant. But it is hardly its duty to assist in the face of such a showing. So when it becomes necessary for the Secretary in the course of a proceeding under the Walsh-Healey Act to appeal to the district court for the exercise of its jurisdiction over subpoena enforcement, it is within the competence and authority of the court to inquire and satisfy itself whether there is probable legal justification for the proceed-

⁸ The Walsh-Healey Act provides in § 5 that the Secretary's findings of fact shall be conclusive in any court of the United States "if supported by the preponderance of the evidence".

ing before it exercises its judicial authority to require a witness or a party to reveal his private affairs or be held in contempt.

Considerations of practical advantage and elementary justice support this conclusion. Such a rule carries out what must have been the statutory intent and would permit a timely and reasonable measure of judicial control over administrative use of the drastic subpoena power, subject to prompt review if the control were abused to the detriment of the agency. If administrative agencies may be temporarily handicapped in some instances by frivolous objections, the public will be protected in other instances against the needless burden and vexation of proceedings which may be instituted without legal justification. There is an obvious difference between the present case, wherein the district court exercises a jurisdiction expressly given to it by the statute, and those cases, such as *Myers v. Bethlehem Corp.*, 303 U. S. 41, and *Newport News Co. v. Schauffler*, 303 U. S. 54, in which without express statutory authority a court is asked to enjoin an administrative proceeding as being contrary to law. Indeed the very difference is noted in the *Myers* case where it is said that "appropriate defense may be made" to an application for the enforcement of an administrative subpoena. 303 U. S. at 49.

Just how much of a showing of statutory coverage should be required to satisfy the district court, and just how far it should explore the question are difficult problems, to be solved best by a careful balancing of interests and the exercise of a sound and informed discretion. If the proposed examination under the subpoena or the proceeding itself would be relatively brief and of a limited scope, any doubt should ordinarily be resolved in favor of the agency's power. If it promises to be protracted and burdensome to the party, a more searching inquiry is indicated. A formal finding of coverage by the agency, which the Secretary did not make here, should be accorded some weight in the court's deliberation, unless wholly wanting in either legal or factual support, but it should not be conclusive. In short the responsibility resting upon the court in this situation is not unlike that of a committing magistrate on preliminary examination to determine whether an accused should be held for trial.

With these considerations in mind, let us turn to the facts of this case. Petitioner has willingly complied with all demands of the Secretary relating to the plants of its establishment, named in the contracts, in which the shoes were manufactured. It resists

the application for enforcement of the subpoenas directing the production of records of other plants, not named in the contracts, in which some component parts for the shoes were manufactured, on the ground that the Walsh-Healey Act does not extend to those plants. It is true that petitioner voluntarily entered into the contracts with the Government, but those referred only to the specific plants where the finished product was made. And, it was not until 1939, after all the contracts were completed, that the Secretary issued rulings specifically dealing with "integrated establishments".⁹ The mere fact that petitioner voluntarily contracted with reference to some plants does not necessarily mean that the Secretary is free to investigate petitioner's entire business without let or hindrance. That depends upon whether or not the Act extends to those other plants. Petitioner was entitled to have this question determined by the district court before the subpoena was enforced over its objection.

In view of the opinion of the Court there is no reason for discussing whether the district court correctly construed the scope of the Walsh-Healey Act, or whether it conducted its examination in accordance with the principles I have attempted to outline in the course of this opinion. It is enough to say that I am of opinion that under the facts of this case the district court should not be compelled mechanically to enforce the Secretary's subpoena, in the exercise of its statutory jurisdiction. It should first satisfy itself that probable cause exists for the Secretary's contention that the Act covers the plants in question.

Mr. Justice ROBERTS joins in this dissent.

⁹ Rulings and Interpretations under the Walsh-Healey Public Contracts Act, No. 2.

